DOCKET

No. 08-453
Title: Andrew M. Cuomo, Attorney General of New York, Petitioner
v.
The Clearing House Association, L.L.C., et al.
Docketed: October 7, 2008
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (05-5996, 05-6001)
Decision Date: December 4, 2007
Rehearing Denied: June 5, 2008
Questions Presented

~~Date~~~	~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 18 2008	Application (08A167) to extend the time to file a petition for a writ of certiorari from September 3, 2008 to October 3, 2008, submitted to Justice Ginsburg.
Aug 26 2008	Application (08A167) granted by Justice Ginsburg extending the time to file until October 3, 2008.
Oct 3 2008	Petition for a writ of certiorari filed. (Response due November 6, 2008)
Oct 29 2008	Order extending time to file response to petition to and including December 8, 2008, for all respondents.
Nov 6 2008	Brief amicus curiae of National Association of Realtors filed.
Nov 6 2008	Brief amici curiae of North Carolina, et al. filed.
Nov 6 2008	Brief amicus curiae of Conference of State Bank Supervisors filed.
Nov 6 2008	Brief amici curiae of Central New York Citizens in Action, Inc., et al. filed.
Dec 8 2008	Brief of Federal Respondent in opposition filed.
Dec 8 2008	Brief of respondent The Clearing House Association, L.L.C. in opposition filed.
Dec 22 2008	Reply of petitioner Andrew M. Cuomo, Attorney General of New York filed. (Distributed)
Dec 23 2008	DISTRIBUTED for Conference of January 16, 2009.
Jan 16 2009	Petition GRANTED. The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The briefs of respondents are to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 23 2009	SET FOR ARGUMENT ON Tueday, April 28, 2009.
Feb 24 2009	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the respondent Clearing House Association, L.L.C.
Feb 25 2009	Joint appendix filed. Statement of costs received.
Feb 25 2009	Brief of petitioner Andrew M. Cuomo, Attorney General of New York filed.
Feb 26 2009	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Mar 3 2009	Brief amici curiae of Members of Congress filed.
Mar 4 2009	Brief amici curiae of Center for Responsible Lending, et al. filed.
Mar 4 2009	Brief amicus curiae of Connecticut Fair Housing Center filed.
Mar 4 2009	Brief amicus curiae of National Association of Realtors filed.
Mar 4 2009	Brief amici curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
Mar 4 2009	Brief amici curiae of National Governors Association, et al. filed.

Mar 4 2009	Brief amicus curiae of American Association of Residential Mortgage Regulators filed.
Mar 4 2009	Brief amici curiae of North Carolina, et al. filed.
Mar 4 2009	Brief amicus curiae of Conference of State Bank Supervisors filed. (Distributed)
Mar 4 2009	Brief amicus curiae of North American Securities Administrators Association, Inc. filed.
Mar 4 2009	Brief amicus curiae of Comptroller of the City of New York filed.
Mar 13 2009	CIRCULATED.
Mar 17 2009	Record received from the U.S.D.C. for the Southern District of New York. This record consist of 3 Transcripts. The remainder of the record is electronically filed. (1 envelope)
Mar 25 2009	Brief of respondent The Clearing House Association, L.L.C. filed. (Distributed)
Mar 25 2009	Brief of respondent Federal Respondent filed.(Distributed)
Mar 31 2009	Motion for divided argument filed by the Solicitor General
Apr 1 2009	Brief amicus curiae of The Chamber of Commerce of the United States of America filed. (Distributed)
Apr 1 2009	Brief amicus curiae of Financial Services Roundtable filed. (Distributed)
Apr 1 2009	Brief amici curiae of American Bankers Association, et al. filed. (Distributed)
Apr 1 2009	Brief amici curiae of All Former Comptrollers of the Currency since 1973 filed. (Distributed)
Apr 3 2009	Motion for divided argument filed by respondent GRANTED.
Apr 6 2009	Record received from the U.S.C.A. for 2nd Circuit. (1 envelope). (There is 1 CD included in this record)
Apr 20 2009	Reply of petitioner Andrew M. Cuomo, Attorney General of New York filed. (Distributed)
Apr 28 2009	Argued. For petitioner: Barbara D. Underwood, Solicitor General, New York, N.Y. For respondent Office of the Comptroller of the Currency: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent The Clearing House Association, L.L.C.: Seth P. Waxman, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

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No. 08-453

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

12 U.S.C. § 484(a), a provision of the National Bank Act, prohibits the exercise of "visitorial powers" as to national banks, except where those powers are authorized by federal law, vested in the courts of justice, or exercised by Congress or a House or committee thereof. The Office of the Comptroller of the Currency has issued a regulation (12 C.F.R. § 7.4000) interpreting § 484(a) to preempt state enforcement of state laws against national banks, even when the state laws are not substantively preempted. The questions presented are:

1. Whether 12 C.F.R. § 7.4000 is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether 12 C.F.R. § 7.4000 is invalid because it is inconsistent with the authoritative construction of the National Bank Act by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 510 F.3d 105. The opinions of the district court (Pet. App. 63a-117a, 118a-142a) are reported at 396 F. Supp. 2d 383 and 394 F. Supp. 2d 620.

JURISDICTION

The court of appeals' judgment was entered on December 4, 2007. A timely petition for rehearing en banc was denied on June 5, 2008. Pet. App. 143a-144a. On August 26, 2008, Justice Ruth Bader Ginsburg granted petitioner an extension of time until October 3, 2008, to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory, and regulatory provisions are reproduced in the appendix to this petition: U.S. Const., art. VI, cl. 2; 12 U.S.C. § 484; and 12 C.F.R. § 7.4000.

STATEMENT

This case presents the question of whether deference is owed under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to a regulation of the Office of the Comptroller of the Currency ("OCC") interpreting a federal statute to deprive the States of authority to enforce their own nonpreempted state laws against national banks.

A provision of the National Bank Act ("NBA"), 12 U.S.C. § 484, enacted in 1864, generally operates to restrict the exercise of "visitorial powers" over national banks to the banks' primary regulator, the OCC. In 2004, the OCC, by regulation, for the first time interpreted that statute to deprive States of their authority to enforce state laws against national banks. The regulation, 12 C.F.R. § 7.4000, did so by expansively interpreting the statutory term "visitorial powers" well beyond its historical meaning to cover virtually all state enforcement, even of generally applicable state laws that are not substantively preempted. The regulation thus prohibits States from bringing even the same kinds of judicial actions against national banks that can be brought by a private party.

Until OCC promulgated its amended "visitorial powers" regulation in 2004, there was no doubt that States could judicially enforce their nonpreempted laws against national banks. This Court so held in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) ("*St. Louis*"), as have numerous other federal and state courts. After the issuance of the regulation, OCC took affirmative steps to prevent States from enforcing their nonpreempted laws against national banks, including instructing national banks not to speak to state attorney general offices and initiating the present lawsuit to terminate the New York Attorney General's investigation into evidence that some national banks are engaged in discriminatory mortgage lending within the State.

Pursuant to the 2004 regulation, a federal district court enjoined the New York Attorney General from taking any actions to enforce state fair-lending laws against national banks. The Second Circuit affirmed, giving deference to the regulation under *Chevron*. That holding warrants this Court's review, both because it conflicts with the Court's decision in *St. Louis*, and because it allows the OCC by regulatory fiat to alter drastically the historic balance of federal and state authority as to national banks.

A. The National Bank Act

Congress first authorized the chartering of national banks in 1863, when it enacted the "National Currency Act," which was amended and reenacted in 1864, and subsequently renamed the "National Bank Act" ("NBA"). The Act's primary purpose was to address pressing wartime federal revenue needs by replacing notes issued by individual state-chartered banks with a new national currency that would be tied to the purchase of federal bonds. Cong. Globe, 37th Cong., 3d Sess. 843 (1863). To maximize both the purchase of United States bonds and the reach of United States bank notes, Congress empowered the Treasury Department to charter private banks to issue the new currency, and thus the national banking system was born. *See* Act of Feb. 25, 1863, National Currency Act, ch. 58, §§ 4-6, 18, 21, 12 Stat. 665, 666-67, 669-70.

To promote public trust in the new currency, the NBA created in the Treasury Department the new office of the Comptroller of the Currency, with supervisory authority over national banks to ensure the safety and

soundness of their financial condition. Act of June 3, 1864, ch. 106, §§ 1, 17, 54, 13 Stat. 99, 104, 116. The Comptroller's responsibilities required him to examine, with respect to each prospective national bank:

> the amount of money paid in on account of its capital, the name and place of residence of each of the directors . . . and the amount of the capital stock of which each is the bona fide owner, and generally whether such association has complied with all the requirements of this act to entitle it to engage in the business of banking.

Id. § 17, 13 Stat. at 104.

To promote bank soundness, Congress authorized the Comptroller to scrutinize bank affairs on an ongoing basis by means of appointed examiners. *Id.* § 54, 13 Stat. at 116. The term "visitorial powers" appeared in that same section, to clarify that only the Comptroller, and not the States, would have the right to conduct examinations of the newly created national banks in order to monitor their financial condition. The section provided that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." *Id.* § 54, 13 Stat. at 116.

Historically, visitorial powers have been understood as "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its [the corporation's] laws and regulations." *Guthrie v.*

Harkness, 199 U.S. 148, 158 (1905) (quotation marks omitted), *quoted in Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559, 1568 (2007). Visitorial powers subject a corporation to supervision by the jurisdiction that granted its corporate charter; they are the powers used to supervise the corporation's use of, and compliance with, its corporate charter.

Today the OCC's examination authority is set forth in 12 U.S.C. § 481, in a subchapter of Title 12 entitled "Bank Examinations." The limitation on States' exercise of visitorial powers is found in 12 U.S.C. § 484(a), as part of the same subchapter. Section 484(a) provides:

> [n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

B. State Authority as to National Banks

From the first establishment of a national banking system, composed of corporations organized under federal law but doing business in particular States, the general rule has been that both federal and state laws apply to national banks. Just five years after the enactment of the NBA, the Supreme Court observed that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869);

accord St. Louis, 263 U.S. at 656. Federal law preempts the application of state law to national banks only where state law conflicts with federal law or substantially interferes with national banks' exercise of their powers. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). This Court has consistently recognized the right of state officials to sue national banks to enforce generally applicable state laws that are not substantively preempted. *See St. Louis*, 263 U.S. at 659-60; *First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 427-28 (1917); *Waite v. Dowley*, 94 U.S. 527, 534 (1876); *see also* Pet. App. 50a-51a (Cardamone, J., concurring in part and dissenting in part) (collecting additional cases).

Congress reaffirmed the important role of state law as to national banks in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338, and the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238. Riegle-Neal was intended to eliminate barriers to interstate branching, and simplify the complex rules for determining which state laws apply to branches of national banks. Congress eliminated many state laws that interfered with interstate branching, but expressly maintained the application of key host-state laws, specifically those pertaining to consumer protection, fair lending, community reinvestment, and establishment of intrastate branches. In Riegle-Neal, Congress made clear that a state law in any of those four categories applies to branches of national banks located in a State to the same extent that it does to branches of banks chartered by that State, unless the state law is preempted by federal law or would have a

discriminatory effect on the national bank. *See* 12 U.S.C. § 36(f)(1)(A). In light of OCC's previously expressed doubts about whether it could enforce state law,[1] Riegle-Neal specifically obligated OCC to enforce national bank branches' compliance with those four categories of state laws. *See id.* § 36(f)(1)(A)-(B).

Congress did not provide, however, that OCC was to have exclusive authority to enforce state laws, and the legislative history points in exactly the opposite direction. The Conference Report accompanying enactment of Riegle-Neal stressed that "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter the institution holds," identifying in particular States' "legitimate interest in protecting the rights of their consumers, businesses, and communities." It further explained that Congress did not intend Riegle-Neal to alter the federal-state balance "and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

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1. At one time, OCC questioned whether it could enforce state laws at all. *See* Nat'l Comm'n on Consumer Fin., *Consumer Credit in the United States* 54 (1972). As of 1977, OCC apparently acknowledged its authority to enforce state laws, but its commitment to exercising that authority remained unclear. *See* Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 Cath. Univ. L. Rev. 1, 18 (1979).

The Conference Report acknowledged OCC's role in issuing "opinion letters and interpretive rules on preemption issues," but criticized OCC's "inappropriately aggressive" conclusions regarding federal law preemption of state consumer protection and fair-lending laws. *Id.*[2] It confirmed that Riegle-Neal did not change the judicially established principle that "national banks are subject to State law in many significant respects," or disturb the settled "rule of construction that avoids finding a conflict between the Federal and State law where possible." *Id.*

C. OCC's Visitorial Powers Rule

Beginning in 1999, the Comptroller attempted to alter this landscape dramatically. That year, OCC issued a regulation expanding the definition of visitorial powers far beyond the historical understanding of the term to include, among other things, "[e]nforcing compliance with any applicable . . . state laws concerning" activities authorized or permitted by federal banking law. 12 C.F.R. § 7.4000(a)(2)(iv) (1999). This regulation purported, for the first time, to prevent a State from exercising its police power to enforce its own valid and nonpreempted laws as they apply to the activities of national banks.

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2. In light of Congress's concern over OCC's overly aggressive preemption opinions, Riegle-Neal requires OCC to provide an opportunity for notice and comment before issuing opinion letters or interpretive rules concluding that federal law preempts the application to a national bank of state laws in any of the four listed categories. *See* 12 U.S.C. § 43(a).

OCC initially took the position that while the 1999 regulation barred state administrative actions against national banks, the rule continued to permit state officials to bring lawsuits to enforce nonpreempted state laws under the exception in § 484(a) for visitorial powers "vested in the courts of justice." *See* Brief of Plaintiff-Counter-Defendant-Appellee Office of the Comptroller of Currency at 39 n.20, *OCC v. Spitzer*, No. 05-6001 (2d Cir. May 30, 2006). In 2004, however, OCC reversed this view, issuing an amended regulation to clarify the "extent of national bank activities subject to the OCC's exclusive vistorial authority" and "the OCC's interpretation of the 'vested in the courts of justice' exception." *See* Rules, Policies, & Procedures for Corporate Activities, 68 Fed. Reg. 6363, 6367 (Feb. 7, 2003) (notice of proposed rulemaking); *see also* Bank Activities & Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (final rule, codified at 12 C.F.R. § 7.4000).

As amended in 2004, 12 C.F.R. § 7.4000(a)(1) defines OCC's purportedly exclusive visitorial powers to include "conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law." The rule gives examples of what it considers the limited circumstances authorized by federal law. *Id.* § 7.4000(b)(1). It also opines that § 484's "courts of justice" exception "does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." *Id.* § 7.4000(b)(2).

The visitorial powers rule therefore purports to prohibit, *inter alia*, a state attorney general from suing a national bank to obtain injunctive and monetary relief for violations of the State's nonpreempted consumer protection and antidiscrimination laws.

The 2004 rule, and the manner in which OCC adopted it, "generated considerable controversy and debate." *See* U.S. GAO, *OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process* 5 (2005), *available at* http://www.gao.gov/new.items/d068.pdf (last visited Oct. 2, 2008). Forty-five state attorneys general objected to OCC's "efforts to divest the States of their historic role in protecting their residents from consumer fraud by all merchants, regardless of type." Comments and Recommendation of the Att'ys Gen. of Forty-Five States, Puerto Rico, the U.S. Virgin Islands, & the Corp. Counsel of D.C. 2 (April 8, 2003).

D. The New York Attorney General's 2005 Investigation and the Suit To Enjoin It

In April 2005, the Office of the New York Attorney General began investigating a number of state and national banks for racial and ethnic discrimination in their residential real-estate lending based on data showing a significantly higher percentage of high-interest home mortgage loans issued by those banks to African-American and Hispanic borrowers than to white borrowers. Racial and ethnic discrimination in the extension of credit violates the New York Human Rights Law (N.Y. Executive Law § 296-a), as well as other state and federal laws.

On the basis of these disparities, the Attorney General sent "letters of inquiry" to the lenders, including several national banks and their operating subsidiaries, requesting that the lenders voluntarily produce more information. Shortly after this, OCC and the Clearing House Association (a consortium of national banks) filed separate actions in the United States District Court for the Southern District of New York, invoking that court's jurisdiction under 28 U.S.C. §§ 1331 (general federal question jurisdiction) and 1345 (suits where federal agency is plaintiff). Relying on 12 C.F.R. § 7.4000, the federal suits sought to enjoin the Attorney General's investigative and enforcement efforts with respect to the national banks. OCC and the Clearing House took the position that "any efforts" by the Attorney General to investigate or enforce provisions of state or federal fair-lending law against national banks or their operating subsidiaries were an unlawful exercise of visitorial powers. *See* Pet. App. 4a. The Attorney General counterclaimed, seeking to have the regulation set aside under the Administrative Procedure Act as arbitrary, capricious, and contrary to law. *See* Pet. App. 5a.

Following a joint bench trial, the District Court for the Southern District of New York (Stein, J.) held that the Attorney General's enforcement activities were prohibited by 12 C.F.R. § 7.4000. *See* Pet. App. 63a-117a, Pet. App. 118a-142a. The district court held that the term "visitorial powers" in § 484 is ambiguous, and concluded that OCC's regulation defining the term broadly to bar nearly all state enforcement of nonpreempted state laws was entitled to deference under *Chevron*. Pet. App. 81a-84a, 96a-106a.

The district court declared that the Attorney General could not enforce state fair-lending laws against national banks or their operating subsidiaries, and permanently enjoined the Attorney General from

> issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Pet. App. 116a-117a.[3]

E. The Court of Appeals' Decision

A divided panel of the Second Circuit affirmed the grant of injunctive relief. *See* Pet. App. 42a. The majority concluded that the OCC's interpretation of § 484(a), as embodied in 12 C.F.R. § 7.4000, was a valid exercise of the OCC's statutory powers and was entitled to *Chevron* deference.

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3. Because the Attorney General was broadly enjoined from taking any action to enforce the state fair-lending laws, no particular state enforcement action is at issue in this petition.

In the action filed by the Clearing House, the district court also enjoined the Attorney General from investigating or suing the banks under the federal Fair Housing Act. Pet. App. 141a. That ruling, however, is not at issue in this petition because the court of appeals unanimously vacated that portion of the injunction for lack of ripeness. Pet. App. 32a-41a, 43a (Cardamone, J., concurring in part and dissenting in part).

The court of appeals first rejected application of the presumption against preemption, concluding that no clear statement of congressional intent was required to justify OCC's interpretation because of the long history of federal regulation of national banks, which already substantially qualifies the exercise of state power. Pet. App. 11a-12a.

Proceeding to step one of the *Chevron* analysis, the court concluded that "the precise scope of 'visitorial' powers is not entirely clear from the text of § 484(a), or the common law background of the term," and therefore the court could not conclude that "the statute clearly precludes the interpretation the OCC has adopted." Pet. App. 21a. The court found no such preclusion in the statutory exception for visitorial powers "vested in the courts of justice" because it found that exception likewise ambiguous. *Id.* at 22a-23a.

The court of appeals dismissed in a footnote this Court's decision in *St. Louis*, which upheld the Missouri Attorney General's enforcement of a state anti-branching statute against a national bank over arguments by the bank, and the United States as amicus curiae, that the visitorial-powers statute precluded such enforcement. Pet. App. 21a n.8. The court observed that the decision in *St. Louis* did not expressly discuss the visitorial-powers statute and noted that, at the time of the decision, national banks were not authorized under federal law to establish branches. *Id.*

After concluding that the regulation was authorized under Congress's delegation of broad rulemaking

authority to OCC, the court further held that OCC's interpretation of the statute was not unreasonable under step two of the *Chevron* analysis. It did so despite noting that "[t]he OCC's analysis [was] at or near the outer limits of what *Chevron* contemplates," since the agency had "accrete[d] a great deal of regulatory authority to itself at the expense of the state through rulemaking lacking any real intellectual rigor or depth." Pet. App. 25a-26a. The court nonetheless concluded that "[i]n drawing the lines that it did in § 7.4000(a), the OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute." Pet. App. 28a.

Judge Cardamone dissented from the affirmance of the injunction. Pet. App. 42a-62a. In his view, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001), and *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), required a clear statement of congressional intent to sustain the OCC's regulation because the regulation "ha[d] altered the compact between the state and national governments." Pet. App. 42a. He noted that "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." Pet. App. 54a. He considered the "likely result" of this "a plain transgression of our republican form of government and a violation of the Tenth Amendment." *Id.*

Judge Cardamone noted not only the absence of a clear statement of congressional intent to reach this far, but also the "clear" fact that "virtually from the inception of the National Bank Act the term [visitorial powers] was *not* understood to preclude state enforcement of nonpreempted state laws." Pet. App. 50a. He noted that Congress has emphasized both the general importance of the dual banking system, and more specifically, the States' strong interest in protecting the rights of their consumers, businesses, and communities. Pet. App. 52a (quoting H.R. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Squarely Conflicts With *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), Which Held That The National Bank Act Does Not Prevent States From Enforcing Their Own Nonpreempted Laws

This Court has long recognized that the National Bank Act does not bar a state attorney general from exercising the core sovereign function of enforcing a nonpreempted state law against a national bank. In *St. Louis*, this Court upheld the authority of the Missouri Attorney General to enforce against a national bank a Missouri statute outlawing branch banking. 263 U.S. at 660. In doing so, the Court necessarily rejected the arguments of the national bank and the United States as amicus curiae that the state suit was barred as a prohibited attempt to exercise "visitatorial powers"

reserved solely to the Comptroller. *Id.* at 643, 645.[4] The Court explained that while "the United States alone" was empowered to bring an action to restrain a national bank from "acting in excess of its charter powers," the State was permitted "to vindicate and enforce its own law." *Id.* at 660.

Moreover, this principle has been applied on numerous other occasions before and after *St. Louis*. In *First National Bank of Bay City*, 244 U.S. at 427-28, the Court had earlier held that the Michigan Attorney General could sue a national bank in state court for violations of a state law prohibiting national banks from engaging in trust services. Likewise in *Waite*, 94 U.S. at 534, the Court affirmed a judgment obtained by a town treasurer against a national bank for failing to comply with state law. More recently, in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 131-33 (1969), this Court held that a national bank was not entitled to declaratory and injunctive relief against a state comptroller's letter ordering the bank to cease and desist certain activities prohibited by state law.[5] Thus, the decision of the court of appeals here flies in the face of settled contrary precedent.

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4. The reference is to the portion of the official syllabus setting forth the arguments of the parties.

5. Many other federal and state courts have similarly entertained suits brought by state officials against national banks alleging violations of nonpreempted state laws. *See* Pet. App. 50a-51a (Cardamone, J., concurring in part and dissenting in part) (collecting cases).

St. Louis not only concerned precisely the issue presented by this case, but also expressly confronted the incongruity of separating the power of a sovereign State to enact a law and the power of that State to enforce it. In rejecting the claim that the NBA barred a State from enforcing its laws against a national bank, the Court asked only "whether the state law [was] free to act" or whether the state law was preempted. 263 U.S. at 660. Once the Court determined that the state law at issue was not preempted by federal law, the Court found the State could necessarily enforce its own law, reasoning that "since the sanction behind [the state law] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." *Id.* The Court explained that "[t]o demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *Id.*[6]

The Second Circuit's opinion, which permits OCC to decouple the State's power to legislate from its power to enforce state law, flatly rejects the principle of *St. Louis*. Indeed, the court of appeals essentially acknowledged as much, dismissing *St. Louis* in a footnote on two grounds, neither one persuasive. First, the court asserted that the *St. Louis* opinion "did not directly address the NBA's restriction of state visitorial

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6. For discussions of why federal banking regulators cannot reasonably be entrusted as the sole enforcers of state laws, see *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967), and *Jackson v. First National Bank of Valdosta*, 349 F.2d 71, 75 & n.1 (5th Cir. 1965).

powers." Pet. App. 21a n.8. In fact, however, because the United States and the bank directly argued to the *St. Louis* Court that state law enforcement was barred by the grant of exclusive visitorial powers to the Comptroller, this Court necessarily rejected that view by upholding the authority of the Missouri Attorney General to enforce the nonpreempted state law.

Second, the court of appeals further attempted to distinguish *St. Louis* on the ground that the state law at issue in that case merely prohibited the bank from engaging in activities it was not authorized to conduct under federal law, whereas New York is here trying to prohibit the banks from engaging in activities that national banks are authorized to undertake. *Id.* In fact, however, the two prohibitions are parallel. In *St. Louis*, Missouri was seeking to enforce a state law that prohibited branch banking, and federal law did not then authorize national banks to operate through branches. 263 U.S. at 655-56, 657-58. Similarly, here, New York is seeking to enforce a state law that, as relevant to this case, prohibits race and ethnic discrimination in lending, and federal law does not authorize or permit national banks to engage in such discrimination. *See* 15 U.S.C. § 1691 *et seq.* (Equal Credit Opportunity Act); 42 U.S.C. § 3601 *et seq.* (Fair Housing Act). The issue presented by this petition arises precisely because the State has been enjoined from enforcing laws which are not substantively preempted, and thus by definition do not substantially interfere with a national bank's exercise of its lawful powers. *See Barnett Bank*, 517 U.S. at 33.

II. The Decision Below Presents The Important And Unresolved Question When, If At All, *Chevron* Deference Is Due To A Regulation Declaring The Preemptive Scope Of A Federal Statute

The linchpin of the Second Circuit's decision was its deference to an OCC regulation interpreting the scope of the NBA's express preemption clause. The statute reserves to the OCC the exclusive right to exercise "visitorial powers" with respect to national banks, with specified exceptions. By deferring to the OCC's broad construction of "visitorial powers," the court of appeals avoided this Court's prior interpretation of the NBA in *St. Louis*, with its more measured and traditional construction of the term.[7]

The circuits are divided as to whether *Chevron* deference is due to an agency opinion as to the preemptive scope of a federal statute. The Second Circuit in this case, like the Sixth Circuit in *Watters*, extended *Chevron* deference to an OCC regulation declaring the NBA's preemptive scope. Pet. App. 23a-31a; *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 (6th Cir. 2005), *aff'd on other grounds*, 550 U.S. 1, 127 S. Ct. 1559; *see also Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314-21 (2d Cir. 2005) (affording *Chevron* deference to 12 C.F.R. § 7.4006), *cert. denied*, 127 S. Ct. 2093 (2007). The Tenth

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7. Where *Chevron* deference applies, a reasonable administrative construction of an ambiguous statute can trump a prior judicial construction. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *But see id.* at 1003 (Stevens, J., concurring) (questioning whether an administrative construction can trump a prior construction by this Court).

Circuit, by contrast, has held that *Chevron* deference does not apply to administrative preemption determinations. *See Colo. Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) (deferring to a federal agency's determination that federal regulations overlapped with state regulations, but independently reviewing the legal issue of whether the state regulations were preempted).

Moreover, this Court has repeatedly recognized the importance and unresolved status of the question of whether and when *Chevron* deference is due to an administrative determination of the scope of a statutory preemption clause. In *Watters*, 550 U.S. 1, 127 S. Ct. 1559, the petition presented the question whether an OCC regulation purporting to clarify a different aspect of the NBA's preemptive scope was properly afforded *Chevron* deference. This Court ultimately found it unnecessary to resolve that question, *id.* at 1572, although three dissenting justices would have held that an agency determination regarding the preemptive effect of a federal statute is not entitled to *Chevron* deference, and that the OCC in particular had not been delegated the authority to preempt the laws of a sovereign State. *Id.* at 1582-83, 1584 (dissenting opinion of Stevens, J., joined by Roberts, C.J., and Scalia, J.).

This Court has repeatedly alluded to this issue in prior opinions without resolving it. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), the Court assumed without deciding that the question of a statute's preemptive effect "must always be decided

de novo by the courts." In *Medtronic Inc. v. Lohr*, 518 U.S. 470, 495-96 (1996), this Court afforded "substantial weight," but not *Chevron* deference, to a Food & Drug Administration ("FDA") regulation construing an express preemption clause in the Medical Device Amendments ("MDA") to the Food, Drug, and Cosmetics Act. Justice O'Connor, concurring in part and dissenting in part, pointedly noted that the majority had "[a]pparently recognize[d] that *Chevron* deference is unwarranted," and noted that "[i]t is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference." *Id.* at 512.

In *Riegel v. Medtronic, Inc.*, 552 U.S. __, 128 S. Ct. 999 (2008), involving the same express preemption clause at issue in *Lohr*, the Court again deflected the question of deference to the FDA's views as to the preemptive effect of the MDA on the ground that the statute spoke clearly to the point at issue. However, the Court surmised that, had the statute been ambiguous, it would have applied at most the reduced degree of deference described in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), presumably because the agency's current views were expressed not in a regulation, but in its amicus brief. *Riegel*, 128 S. Ct. at 1009.

Indeed, the importance of the issue is demonstrated by the fact that another case involving related but significantly different issues of deference to agency views about preemption is already on the Court's docket: *Wyeth v. Levine*, No. 06-1249 (cert. granted, Jan. 18, 2008; argument scheduled, Nov. 3, 2008). The instant case concerns possible *Chevron* deference to a regulation interpreting an express preemption clause. *Wyeth*, in

contrast, concerns the possible application of other, lesser forms of deference to agency views about implied conflict preemption that are not embodied in any regulation. Brief for Petitioner at 50 & n.22, *Wyeth*, No. 06-1249 (U.S. May 27, 2008). Because the issues are different, the presence of *Wyeth* on the docket counsels for, and not against, granting the petition here.

The extent, if any, of agency power to make binding preemption determinations is of great and growing importance nationwide, as "federal administrative agencies increasingly seem to claim for themselves the authority to distribute power between the federal government and the states" through their own preemption determinations. Nina A. Mendelson, *Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 697 (2008).

Moreover, the issue is particularly important because *Chevron* deference to a regulation declaring the preemptive scope of a federal statute raises serious issues of institutional competence and threatens the traditional role of the courts in maintaining the proper federal-state balance. *See, e.g.*, Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737 (2004); Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2293-97 (2004).

Considerations of institutional competence point to courts, rather than agencies, as the appropriate decision-makers when the scope of statutory preemption is at issue, because preemption issues in general, and

this one in particular, raise sensitive questions of federalism, which agencies are not institutionally equipped to resolve. Depriving States of their power to enforce their own valid laws removes a core attribute of their sovereignty, since "'the power to create and enforce a legal code, both civil and criminal' is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986)(quoting *Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982)). Indeed, as the dissenting opinion below observed, "[i]t is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws." Pet. App. 55a.

Accordingly, courts, rather than agencies, are best equipped to police the proper boundaries of state and federal authority and maintain the appropriate balance between them. As the *Watters* dissenters observed, "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 127 S. Ct. at 1584 (Stevens, J. dissenting, joined by Roberts, C.J., and Scalia, J.).

Furthermore, the framework for addressing these federalism concerns is defined by the complex legal doctrines governing preemption analysis, which the courts, not administrative agencies, have developed and are most expert in applying. *See Colo. Pub. Utils. Comm'n*, 951 F.2d at 1579. Indeed, in promulgating the regulation at issue here, OCC did not invoke the kind of agency expertise that might support deference of any variety, but rather advanced legal arguments based primarily on judicial decisions, law review articles, and

legislative history, as to which OCC possesses no special competence. As the Second Circuit acknowledged and found "troublesome":

> The administrative record here consists almost entirely of the agency's interpretation of case law, legislative history, and statutory text. These are not subjects on which the OCC holds any special expertise, nor has the OCC identified any particularly technical aspect of the regulatory subject matter that the agency is "uniquely qualified to comprehend."

Pet. App. 25a (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quotation marks and internal citations omitted)). The court of appeals also noted that OCC "did not appear to find any facts at all in promulgating its visitorial powers regulation." Pet. App. 25a. This further underscores that *Chevron* deference is not warranted.

Even if there were a case for extending *Chevron* deference to agency decisions of this sort, an appropriate congressional delegation of rulemaking authority would be required, as it is in all cases of *Chevron* deference. *See Gonzalez v. Oregon*, 526 U.S. 243, 257-58 (2006) (refusing to extend *Chevron* deference to an agency interpretation because it fell outside the scope if its rulemaking authority). It is an open question whether a general delegation of rulemaking authority to an agency to execute its own business is sufficient to authorize the agency to grant immunity from state regulation, or whether a more specific delegation addressing preemption of state law is required.

See, e.g., *Watters*, 127 S. Ct. at 1582-83 & n.23 (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.) (rejecting OCC's assertion that its general rulemaking authority under 12 U.S.C. §§ 93a and 371 also provides it with preemptive authority).

III. The Decision Below Warrants This Court's Review Because It Profoundly Shifts The Federal-State Balance And Deprives States Of Their Core Sovereign Power To Enforce Their Nonpreempted Laws Against National Banks

The statutory interpretation announced in the OCC regulation and endorsed by the Second Circuit works a major alteration of the balance of power between the federal and state governments. The resulting regime deprives States of the power to enforce against national banks state antidiscrimination laws and other laws of general applicability that have not been preempted as applied to those banks.

As Justice Kennedy has memorably observed, "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In a nation of dual sovereigns, each sovereign has a unique interest in vindicating its own laws. Preventing a State from enforcing its own valid laws is in many ways a more serious incursion on state sovereignty than preempting the operation of a state law altogether, because it assigns to one sovereign the enforcement of another sovereign's laws, violating the cardinal principle, quoted above, that "each [must be] protected from incursion by the other."

Under that principle Congress cannot compel state law enforcement officers to administer a federal regulatory program without violating state sovereignty. *Printz v. United States*, 521 U.S. 898, 933 (1997). And a similar affront to federalism occurs when the Comptroller prohibits state law-enforcement officers from enforcing state laws that are valid and not preempted. As this Court has observed in a different context, "'the power of a State to pass laws means little if the State cannot enforce them.'" *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (quoting *McClesky v. Zant*, 499 U.S. 467, 491 (1991)). Indeed, this Court made a similar point in *St. Louis*, in rejecting the claim that the NBA prevented States from enforcing their own valid laws: "[t]o demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." 263 U.S. at 660.

Under settled principles of statutory construction, "if Congress intends [a statute] to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (quotation marks omitted). Moreover, a presumption against preemption applies to laws, such as consumer protection and antidiscrimination statutes, that are enacted under the States' historic police powers. *See Lohr*, 518 U.S. at 485.[8] OCC's

8. Furthermore, in Riegle-Neal, Congress made clear its intention that state consumer protection and fair-lending laws (Cont'd)

regulation may not supply the clear statement required to satisfy the *Gregory* canon or the presumption against preemption; rather, that must come from Congress itself. This Court has reached a similar conclusion in the analogous context of the constitutional-avoidance doctrine, ruling that when a statute is ambiguous, and a court is therefore required to construe it to avoid constitutional questions, an agency's interpretation cannot remove the ambiguity and escape the requirement. *See Solid Waste Agency of N. Cook County*, 531 U.S. at 172; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-78 (1988). Accordingly, a clear statement from Congress, not OCC, is necessary if 12 U.S.C. § 484 is to be construed in a manner that disturbs the federal-state balance.

Here, as the court of appeals acknowledged (Pet. App. 21a), the visitorial-powers limitation in § 484 does not evidence any clear congressional intention to strip States entirely of their power to enforce nonpreempted state laws against national banks. The Second Circuit specifically noted uncertainty as to "whether or not [States' powers to enforce state antidiscrimination laws] unambiguously fall within the scope of § 484(a)." *Id.* And in fact, the historical meaning of the key statutory phrase "visitorial powers" is to the contrary.

(Cont'd)

generally should apply to national banks. *See* Riegle-Neal, Pub. L. No. 103-328, § 102(b), 108 Stat. at 2349 (codified as amended at 12 U.S.C. § 36(f)(1)(A)); *see also* H.R. Rep. No. 103-651, *supra*, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074 (endorsing the judicially established "rule of construction that avoids finding a conflict between the Federal and State law where possible").

Traditionally, "visitorial powers" subject a corporation to special supervision by the jurisdiction that granted its corporate charter; they are the powers used to supervise the corporation's use of, and compliance with, its corporate charter. As *St. Louis* itself demonstrates, *see supra* at 15-18, the concept does not grant a corporation immunity from all law enforcement by jurisdictions that did not grant the corporation its charter.[9]

In this case, the New York Attorney General is not attempting to exercise supervisory control over national banks, and has not asserted any authority to audit the books and records of national banks or to police their compliance with their federal charter. *See* Pet. App. 49a (Cardamone, J., concurring in part and dissenting in part). Nor has the Attorney General sought to examine their safety and soundness as financial institutions. These have always been the proper concerns of the entity with visitorial powers. *See Guthrie*, 199 U.S. at 158 ("visitorial powers" denotes a supervisory authority "to examine into [a corporation's] manner of conducting business, and enforce an observance of its [the corporation's] laws and regulations" — *i.e.*, its charter and by-laws (quotation marks omitted)); *St. Louis*, 263

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9. Several early corporations treatises reflect this distinction between the visitor's exclusive authority to enforce the corporate charter and the undiminished power of other institutions to enforce general provisions of law. *See, e.g.*, James Grant, *A Practical Treatise on the Law of Corporations in General, as Well Aggregate as Sole* 517 (1850); Stewart Kyd, *A Treatise on the Law of Corporations* 276 (1794); Joseph K. Angell & Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* 659 (8th ed. 1866).

U.S. at 660 (noting that the Comptroller alone may enforce a national bank's compliance with "the charter or law of its creation").[10]

The concern of the New York Attorney General in this case, by contrast, is to investigate racial discrimination in the terms of mortgages issued in New York, in contemplation of a possible judicial action to enforce a state antidiscrimination law that applies equally to all actors within the State.[11] Such enforcement of generally applicable laws has never been encompassed by the term "visitorial powers."[12] Accordingly, § 484(a) certainly contains no clear statement of congressional intent to prohibit the Attorney General from enforcing nonpreempted New York antidiscrimination laws against national banks.

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10. The congressional debates about the NBA treat the phrase "right of visitation" as synonymous with the right to examine the bank in order to monitor its financial condition and organization. *See* Cong. Globe, 37th Cong., 3d Sess. 824 (1863).

11. This Court's decision in *Watters*, 127 S. Ct. 1559, held that the Comptroller's exclusive visitorial authority applies not only to national banks, but also to their operating subsidiaries. In that case, the Court ruled that the NBA preempted a state administrative enforcement regime based on registration and licensing requirements. *Watters*, in contrast to this case, did not involve judicial enforcement of generally applicable laws.

12. Moreover, if such judicial enforcement were thought to be an exercise of visitorial powers, which it is not, there would nevertheless be the further hurdle of overcoming the exception in § 484(a) for such powers "vested in the courts of justice."

IV. The OCC's Interpretation Of § 484 Effectively Immunizes National Banks From Enforcement Of State Consumer Protection And Fair-Lending Laws

The practical effect of accepting OCC's construction of § 484 is to eradicate all government enforcement of state laws as to national banks.[13] It is no answer that the Comptroller is able to enforce such laws, because OCC is not designed or equipped to enforce States' consumer protection laws against national banks, has no record of doing so, and has shown no intention of changing its traditional indifference.

To be sure, Congress has provided the Comptroller with certain limited remedial powers to redress violations of law, including state law, by national banks, *see* 12 U.S.C. § 1818, but those powers exist primarily to ensure the safety and soundness of those financial institutions, and only secondarily to redress harm to consumers. Moreover, given OCC's structure and resources, it cannot reasonably supplant the enforcement role traditionally played by state attorneys general. According to publicly available reports, OCC was responsible in 2005 for monitoring about 2,400 national banks, branches of foreign banks, and operating subsidiaries of national banks that do business directly with consumers.[14] OCC has informed the GAO

13. While private enforcement remains theoretically available, it is unrealistic to suppose that private parties can fully vindicate the interests protected by these state laws.

14. Comptroller of the Currency, U.S. Dep't of the Treasury, *Annual Report: Fiscal Year 2005*, at 7, *available at* http://

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that it does not even have procedures for examining compliance with state law. *See* U.S. GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 22-23 (2006).

States, by contrast, have considerable expertise in enforcing their laws and have enforced state laws prohibiting abusive financial practices more than has OCC.[15] States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise. And as OCC increasingly permits national banks and their subsidiaries to expand into nonfinancial areas, States' greater expertise and experience in identifying abuses in those areas will become even more essential to protecting consumers' interest.

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www.occ.treas.gov/annrpt/2005AnnualReport.pdf; Comptroller of the Currency, U.S. Dep't of the Treasury, *Annual Report of National Bank Operating Subsidiaries That Do Business Directly With Consumers*, *available at* http://www.occ.treas.gov/customer. htm (follow Excel hyperlink) (last visited Oct. 2, 2008).

15. For examples of enforcement efforts against operating subsidiaries under state laws, see *Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001) (state enforcement action under state consumer fraud and deceptive practices law); Compl., *State v. First Horizon Home Loan Corp.*, No. 272/2004 (N.Y. Sup. Ct. filed Jan. 16, 2004), *available at* http://www.oag.state.ny.us/press/2004/jan/Horizon5.pdf (last visited Oct. 2, 2008) (state enforcement action under state unlawful debt collection and deceptive practices law).

Congress recently made clear its intent that state consumer protection and fair lending laws be vigorously enforced. *See, e.g.*, Riegle-Neal, Pub. L. No. 103-328, § 102(b), 108 Stat. at 2349-50 (codified as amended at 12 U.S.C. § 36(f)(1)-(2)); H.R. Rep. No. 103-651, *supra*, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074. To the limited extent OCC can and actually does take steps to aid individuals harmed by national banks' illegal practices, those efforts serve Congress's stated goals. But it is unreasonable and dangerous, not to mention contrary to congressional design, to deprive consumers of the additional enforcement resources that state attorneys general have long brought to bear on these concerns, particularly when recent events show that active law enforcement against banks is badly needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 3, 2008

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DECIDED DECEMBER 4, 2007

UNITED STATES COURT OF APPEALS
For the Second Circuit

August Term, 2006

(Argued: December 4, 2006 Decided: December 4, 2007)

Docket Nos. 05-5996-cv (L), 05-6001-cv (CON)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff-Appellee,

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Plaintiff-Counter-Defendant-Appellee,

—v.—

ANDREW M. CUOMO,* in his Official Capacity as Attorney General for the State of New York,

Defendant-Counter-Claimant-Appellant.

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* Pursuant to Fed. R.App. P. 43(c)(2), Andrew M. Cuomo is automatically substituted for former Attorney General Eliot Spitzer in this action.

Appendix A

Before:

CARDAMONE and B.D. PARKER, *Circuit Judges*, and KOELTL, *District Judge*.**

Judge Cardamone concurs in part and dissents in part in a separate opinion.

BARRINGTON D. PARKER, *Circuit Judge*:

The National Bank Act ("NBA" or "Act") authorizes national banks to engage in a broad range of business activities, and also limits the exercise of "visitorial powers" over such banks.[1] The Office of the Comptroller of the Currency ("OCC") is the agency Congress has entrusted to implement the NBA and to oversee the national banks' exercise of their powers. This appeal concerns the residual authority of state officials in regards to laws pertaining to real estate lending, one of the banking activities governed by the NBA and OCC regulations.

** The Honorable John G. Koeltl, United States District Judge for the Southern District of New York, sitting by designation.

1. 12 U.S.C. § 484(a) provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Appendix A

I

In 2005, the New York State Attorney General began investigating evidence of possible racial discrimination in the residential real estate lending practices of several national banks and their operating subsidiaries. The Attorney General's investigation was prompted by data that the federal Home Mortgage Disclosure Act ("HMDA") requires lenders to make public. *See* 12 U.S.C. §§ 2801-10. The Attorney General observed that recent HMDA data appeared to indicate that a significantly higher percentage of high-interest home mortgage loans are issued to African-American and Hispanic borrowers than to white borrowers.

On the basis of these apparent racial disparities, the Attorney General sent "letters of inquiry" to mortgage lenders implicated by the data, including several national banks and their operating subsidiaries.[2] The letters stated that such disparities "are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a."[3] "In lieu of issuing a

2. The banks included Wells Fargo, HSBC, J.P. Morgan Chase, and Citigroup.

3. Section 296—a broadly prohibits creditors from discriminating on the basis of race, sex, national origin, or other protected grounds. Though not restricted to real estate lending, the statute specifically prohibits discrimination regarding "applications for credit with respect to the purchase, acquisition,

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formal subpoena," the letters requested that lenders voluntarily produce certain non-public information regarding their mortgage policies and practices, as well as data concerning loans related to real property in New York State.

Soon afterwards, the OCC sued to enjoin the Attorney General's investigative and enforcement efforts. A recently promulgated OCC regulation expansively interpreted the NBA's visitorial powers provision, 12 U.S.C. § 484, to preclude state officials from enforcing national banks' compliance with state or federal laws that concern activities authorized or permitted under the NBA. *See* 12 C.F.R. § 7.4000(a)(2)(iv). On the strength of this regulation, the agency took the position that any efforts by the Attorney General to investigate or to enforce provisions of the Equal Credit Opportunity Act and New York State Executive Law § 296-a against national banks or their operating subsidiaries were an unlawful exercise of visitorial powers.

The Clearing House Association ("Clearing House")—a consortium of national banks, including several that received letters of inquiry from the

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construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space." N.Y. Exec. Law § 296-a(1)(a). It further bars discrimination "in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit." *Id.* § 296-a(1)(b).

Attorney General—filed a similar complaint, seeking to enjoin the Attorney General from "investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination-in-lending laws" against its national bank members and their operating subsidiaries.

The Attorney General counterclaimed, arguing that the OCC's regulation was unlawful and should be set aside under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.[4] In his Answer, the Attorney General asserted that racial disparities reflected in the HMDA data "established a *prima facie* case, under the federal Fair Housing Act," 42 U.S.C. § 3605(a), as well as under New York State Executive Law § 296-a. The Attorney General contended that his investigation was not a prohibited exercise of visitorial powers, and that the OCC was not acting aggressively in this area. Alternatively, the Attorney General contended that he was empowered, as *parens patriae*, to sue under the Fair Housing Act ("FHA"), and that even if such a suit were considered a "visitation" it would come within § 484(a)'s exception for "visitorial powers . . . authorized by Federal law."

Following a trial on the merits, the United States District Court for the Southern District of New York (Stein, *J.*) deferred to the OCC's interpretation of the

4. The APA provides, in part, that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

statute, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and concluded that the Attorney General's investigation was prohibited. *Office of the Comptroller of the Currency v. Spitzer*, 396 F.Supp.2d 383 (S.D.N.Y.2005) ("*OCC v. Spitzer*"). In a separate opinion, the court agreed with Clearing House that the FHA does not create an exception authorizing the exercise of visitorial powers otherwise prohibited under § 484(a). *Clearing House Ass'n, L.L. C. v. Spitzer*, 394 F.Supp.2d 620 (S.D.N.Y.2005) ("*Clearing House v. Spitzer*"). Accordingly, in both cases the court issued the declaratory and injunctive relief sought by the OCC and Clearing House.

We affirm the district court's judgment in *OCC v. Spitzer*. We affirm in part and vacate in part the district court's separate judgment in *Clearing House v. Spitzer*. We affirm that part of the *Clearing House* judgment granting Clearing House the injunctive relief provided in *OCC v. Spitzer*. We vacate, however, that part of the *Clearing House* judgment granting permanent injunctive relief against the Attorney General's enforcement of the FHA. We hold that the district court lacked jurisdiction to decide the FHA claim, and we remand the case to the district court with instructions to dismiss that claim.

II

The NBA provides for the creation of national banks, and authorizes them to exercise certain enumerated powers, as well as "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 Seventh. The OCC is the federal agency primarily responsible for overseeing "the business of banking" under the statute. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). To that end, the OCC has been granted broad authority by Congress "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. This includes the authority "to define the 'incidental powers' of national banks beyond those specifically enumerated in the statute." *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 312 (2d Cir.2005); *see also NationsBank*, 513 U.S. at 257-59, 115 S.Ct. 810.

Section 484 provides, in part, that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice." 12 U.S.C. § 484(a). The Supreme Court has defined visitation as "the act of a superior or superintending officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance of its laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158, 26 S.Ct. 4, 50 L.Ed. 130 (1905) (internal quotation marks omitted). We recently observed that the purpose of the visitorial powers restriction is to "prevent inconsistent or

intrusive state regulation from impairing the national system." *Burke*, 414 F.3d at 311; *see also Watters v. Wachovia Bank, N.A.*, __ U.S. __, 127 S.Ct. 1559, 1568, 167 L.Ed.2d 389 (2007).

In 1996, the OCC adopted a regulation clarifying that, under § 484(a), "the exercise of visitorial powers over national banks is vested solely in the OCC." 12 C.F.R. § 7.4000 (1997); 61 Fed.Reg. 4862, 4869 (Feb. 9, 1996) (final rule). The OCC revised this regulation in 1999 "to clarify the extent of the OCC's visitorial powers" and to "codif[y] the definition of visitorial powers and illustrate[ ] what vistitorial powers include by providing a non-exclusive list of these powers." 64 Fed.Reg. 60092, 60094 (Nov. 4, 1999) (final rule). The previous version of the rule had indicated that "[s]tate officials have no authority to conduct examinations or to inspect or require the production of books or records of national banks, except for the limited purpose[s]" specified in § 484(b).[5] 12 C.F.R. § 7.4000 (1997). The revised rule added "prosecuting enforcement actions" against such banks as an example of prohibited state visitorial powers. *See* 64 Fed.Reg. at 60100.

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5. 12 U.S.C. § 484(b) provides that, notwithstanding the restriction on visitorial powers in subsection (a):

> [L]awfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

In its present form, Section 7.4000 lists several examples of prohibited visitations, including "(i) Examination of a bank; (ii) Inspection of a bank's books and records; (iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) *Enforcing compliance with any applicable federal or state laws concerning those activities.*" 12 C.F.R. § 7.4000(a)(2) (emphasis added).

The regulation also addresses the exceptions included in § 484(a) for visitorial powers "authorized by Federal law" and "vested in the courts of justice." The OCC construes the courts-of-justice exception as "pertain[ing] to the powers inherent in the judiciary" and "not grant[ing] state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(b)(2); 69 Fed Reg. 1895, 1904 (Jan. 13, 2004) (final rule). OCC regulations do not directly interpret the "authorized by Federal law" exception, but rather provide a non-exclusive list of federal "laws vesting visitorial power in other governmental entities," including state officials, to engage in particular visitorial acts. 12 C.F.R. § 7.4000(b)(1). These include, for example, "[v]erify[ing] payroll records for unemployment compensation purposes," pursuant to the Internal Revenue Code, 26 U.S.C. § 3305(c); "[a]scertain[ing] the correctness of Federal tax returns," under 26 U.S.C. § 7602; and "[e]nforc[ing] the Fair Labor Standards Act," under 29 U.S.C. § 211. *Id.* §§ 7.4000(b)(1)(iii), (iv), (v).

III

We review a district court's grant of a permanent injunction for abuse of discretion. *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir.2004). A district court abuses its discretion when it bases its decision on an error of law or a clearly erroneous finding of fact. *Id.*; *S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir.2001). Although the parties disagree about the facts underlying the Attorney General's investigation—especially the significance of the HMDA data as evidence of possible racial bias in mortgage lending—those facts are not at issue here. The only questions before us are legal ones.

A

Central to the parties' dispute is the meaning of the term "visitorial powers" in § 484(a). The OCC argues that its interpretation of "visitorial powers" should be afforded *Chevron* deference while the Attorney General denies that the OCC's interpretation is entitled to such deference. Under *Chevron*, we first ask whether Congress has spoken directly to the precise question at issue. *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. If Congress's intent is clear, both the court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843, 104 S.Ct. 2778. If, however, "the statute is silent or ambiguous with respect to the specific issue," we proceed to the second step of the *Chevron* analysis, in which "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

The Attorney General raises an initial argument that the *Chevron* framework does not apply to the OCC's interpretation of the statute at issue here. The Attorney General argues that by limiting the visitorial powers that apply to national banks, Congress clearly did not intend to divest states of the authority to enforce their own otherwise non-preempted laws against such banks. Such authority, the Attorney General contends, is an intrinsic aspect of state sovereignty and its exercise cannot be curtailed in the absence of a clear statement of Congressional intent. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." (internal quotation marks omitted)); *see also Diamond v. Charles*, 476 U.S. 54, 65, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) ("[T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State." (internal quotation marks omitted)). Accordingly, the Attorney General urges us not to afford *Chevron* deference to the OCC's interpretation of the statute, as the district court did.

The first question is whether a presumption against preemption applies to the OCC's regulation interpreting § 484(a). Federal preemption can be express or implied, but in either case is primarily a question of Congressional intent. *See Barnett Bank of Marion County., N.A. v. Nelson*, 517 U.S. 25, 31, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). "Preemption can generally occur in three ways:

where Congress has expressly preempted state law, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law, or where federal law conflicts with state law." *Burke*, 414 F.3d at 313; *see also Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). "Federal regulations have no less pre-emptive effect than federal statutes." *de la Cuesta*, 458 U.S. at 153, 102 S.Ct. 3014.

Ordinarily, a presumption against preemption applies in areas of regulation traditionally allocated to the states. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). In *Wachovia v. Burke*, we observed that this presumption "disappears" in the context of national bank regulation, which has been "substantially occupied by federal authority for an extended period of time." *Burke*, 414 F.3d at 314 (internal quotation marks omitted); *see also Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir.2005). Historically, the Supreme Court has "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank*, 517 U.S. at 32, 116 S.Ct. 1103. The district court, therefore, did not err in determining that no presumption against preemption applies to the regulation at issue here.

For essentially the same reason, we also reject the Attorney General's reliance on the somewhat broader principle that—whether or not a presumption against preemption applies—"[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) (" *SWANCC* "). That broader principle is rooted in the doctrine of constitutional avoidance, which the Supreme Court has recognized may, in some instances, trump the deference typically afforded to an agency's interpretation of the statute it administers. *See id.*; *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). The concern about reaching constitutional issues unnecessarily, and the corresponding demand for a clear statement from Congress, is "heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173, 121 S.Ct. 675.

The Attorney General has not demonstrated that acceptance of the OCC's interpretation of § 484 would cast doubt on the constitutionality of the underlying statute. *Cf. id.; DeBartolo*, 485 U.S. at 575-76, 108 S.Ct. 1392. Nor do we see any reason to believe that such interpretation invokes the outer limit of *Congress's* power so as to trigger a clear statement requirement. National banks, as creatures of federal statute, are subject first and foremost to federal law. As a result, the exercise of "traditional" state power in the context of national banking regulation is already substantially qualified. While national banks do not operate entirely free of state law obligations, "[s]tates can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34, 23 L.Ed. 196 (1875); *see Watters*, 127 S.Ct. at 1567. Where, as here, Congress has already expressed its intent to limit the role of the states in regulating national banks—especially when such conduct involves the exercise of powers granted to the banks by federal statute and regulation—we do not perceive the need for any further statement of intent to achieve the limitation at issue here. On this basis, we conclude that the district court did not err in finding that a clear statement was not required to justify the OCC's interpretation of § 484(a).

We turn next to the Attorney General's contention that § 484(a) is clear, and that the statute precludes the interpretation the OCC has adopted.[6] As we have already noted, the first question we ask in reviewing an agency's construction of the statute it administers is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778. The two questions at issue here both concern the scope of visitorial powers encompassed by § 484(a). They are: (1) whether Congress intended to preclude state officials from enforcing non-preempted state laws that, like New York's discrimination-in-lending law, concern the federally authorized activities of national banks; and (2) whether Congress intended to permit state officials to exercise otherwise prohibited visitorial powers by bringing actions in the "courts of justice."

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6. The Attorney General concedes on appeal, as he did below, that if the OCC's regulation is upheld, it would bar his investigation and threatened enforcement action, except insofar as he asserts a right to proceed under the FHA. *See OCC v. Spitzer*, 396 F.Supp.2d at 390.

Appendix A

(i)

In construing § 484(a), we do not write on a blank slate. The Supreme Court interpreted "visitorial powers" in the context of the NBA for the first time in *Guthrie v. Harkness*, 199 U.S. 148, 26 S.Ct. 4, 50 L.Ed. 130 (1905). At issue in *Guthrie* was whether the NBA precludes an individual shareholder from inspecting the books and records of a national bank. The Court examined various dictionary definitions of the term "visitorial," and summarized its common law history. Based on these various sources, the Court concluded that the visitorial powers restricted by Congress in the NBA do not include "the common-law right of the shareholder to inspect the books of the corporation." *Id.* at 157, 26 S.Ct. 4. This conclusion followed from the Court's acknowledgment that "[t]he right of visitation [is] a *public* right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers." *Id.* at 158-59, 26 S.Ct. 4 (emphasis added).

The Attorney General suggests that although *Guthrie* involved a lawsuit brought by a private plaintiff, the Court's opinion is consistent with the understanding that "visitation" refers primarily to examination of a corporation's books and records for the limited purposes of managerial oversight and monitoring compliance with a bank's charter, and that the term does not encompass enforcement of state laws of general applicability. This understanding, the Attorney General maintains, is reinforced by the text and structure of the NBA.

In its current form, the NBA details the OCC's specific examination powers over national banks in a different section from the visitorial powers restriction. *See* 12 U.S.C. § 481. Originally, these two provisions were set forth in the same section of the Act, which provided that national banks "shall not be subject to any *other* visitorial powers than such as are authorized by this act." Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116 (emphasis added). Notwithstanding the NBA's subsequent reorganization, the Attorney General argues that the visitorial powers language currently found in § 484(a) simply forbids the states from usurping those regulatory powers that the statute grants explicitly to the OCC. In this interpretation, § 484(a) would act mainly as a constraint on the administrative powers exercised by state banking officials.

As the court below pointed out, the Attorney General's proposed reading ignores the fact that the NBA, both as originally enacted and in its present version, authorizes the OCC to sue in its own name to redress certain violations—a power that might itself be considered visitorial. *See OCC v. Spitzer*, 396 F.Supp.2d at 394; Act of June 3, 1864, ch. 106, § 53, 13 Stat. 99, 116 (codified at 12 U.S.C. § 93(a)); *see also Guthrie*, 199 U.S. at 157, 26 S.Ct. 4 ("The visitation of civil corporations is by the government itself, through the medium of the courts of justice."); Roscoe Pound, *Visitatorial Jurisdiction Over Corporations In Equity*, 49 Harv. L.Rev. 369, 372 (1936) (noting that at common law, visitorial powers were executed primarily by "the King act[ing] through his courts").

Appendix A

The Supreme Court's decision in *Watters v. Wachovia* casts further doubt on the Attorney General's interpretation. *Watters* involved the State of Michigan's effort to enforce two statutes concerning mortgage lending against a national bank's operating subsidiary, Wachovia Mortgage. The statutes imposed registration and disclosure requirements on mortgage lenders, including national bank operating subsidiaries and other state-chartered institutions. *Watters*, 127 S.Ct. at 1565-66. They also granted to the commissioner of Michigan's Office of Insurance and Financial Services "inspection and enforcement authority over registrants," and "authorize[d] the commissioner to take regulatory or enforcement actions against covered lenders." *Id.* at 1566. The State argued—contrary to another recent OCC regulation, 12 C.F.R. § 7.4006—that operating subsidiaries are not themselves national banks, and that state laws regulating such subsidiaries are therefore applicable and enforceable. *Id.*

The powers granted to the commissioner under the Michigan statutes, the Court observed, were undeniably "visitorial" and thus, as the parties conceded, could not be applied to national banks themselves. "State laws that conditioned national banks' real estate lending on registration with the State," the Court explained, " *and subjected such lending to the State's investigative and enforcement machinery* would surely interfere with the banks' federally authorized business." *Id.* at 1568 (emphasis added). Citing § 484(a), as well as the OCC's definition of visitorial powers in 12 C.F.R. § 7.4000(a)(2), the Court concluded that Michigan "cannot confer on

its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 1569. Because the banks' "authority to engage in the business of mortgage lending comes from the NBA . . . as does the authority to conduct business through an operating subsidiary," the OCC's exclusive visitorial powers under § 484(a) extend to operating subsidiaries engaged in mortgage lending just as to their parent national banks.[7] *Id.* at 1572.

In this regard, the Court in *Watters* concluded that the level of deference owed to the OCC's regulation, § 7.4006, "is an academic question," since that regulation "merely clarifies and confirms what the NBA already conveys: A national bank has the power to engage in real estate lending through an operating subsidiary, subject to the same terms and conditions that govern

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7. In *Watters*, the Court emphasized the unique characteristics of national bank operating subsidiaries, which are "licensed by OCC" and whose authority to carry on the business of banking—according to statute—coincides completely with that of the parent bank. 127 S.Ct. at 1571. The Court pointed out that Congress has distinguished operating subsidiaries from other "affiliates" of national banks. *Id.* Accordingly, while we hold below that, in accordance with OCC regulations, the Attorney General is precluded from investigating either parent national banks or their operating subsidiaries for alleged violations of state fair lending laws, our reasons for this conclusion would not apply to the quite different question of whether a state investigation or enforcement action directed at any other type of national bank affiliate would necessarily violate § 484(a). Nor do we understand the OCC to have taken any position on this issue.

the national bank itself; that power cannot be significantly impaired or impeded by state law." *Id.* at 1572; *cf. Burke*, 414 F.3d at 321 (upholding § 7.4006 on the basis of a *Chevron* analysis).

Watters does not directly address the questions at issue here. Nevertheless, the Court implied that investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision, and that the OCC was not clearly wrong to include in its definition of visitorial powers "[e]nforcing compliance with any applicable federal or state laws concerning" a national bank's authorized banking activities. 12 C.F.R. § 7.400(a)(2)(iv); *see Watters*, 127 S.Ct. at 1568-69. Even more significantly, *Watters* emphasized that "in analyzing whether state law hampers the federally permitted activities of a national bank, [the Court] ha[s] focused on the exercise of a national bank's *powers*." *Id.* at 1570.

The *Watters* dissent maintained, as the Attorney General does here, "that nondiscriminatory laws of general application that do not 'forbid' or 'impair significantly' national bank activities should not be preempted." *Id.* at 1574 (Stevens, J., dissenting). The premise of the majority opinion, however, is that enforcement of a state law purporting to regulate a national bank's exercise of the powers it has been granted under the NBA may constitute a prohibited

visitation under § 484(a), whether or not the law itself directly conflicts with a federal statute or regulation.[8]

Although the precise scope of "visitorial" powers is not entirely clear from the text of § 484(a), or the common law background of the term, we cannot agree with the Attorney General that the statute clearly precludes the interpretation the OCC has adopted. It seems clear to us, after *Watters*, that investigative and enforcement powers of the type the Attorney General has sought to exercise here are at least in some sense "visitorial," whether or not they unambiguously fall within the scope of § 484(a). *Cf. Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 989 (3d Cir.1980) (concluding that while "[i]t is not clear just what 'visitorial' powers include . . . they do encompass examination of the bank's books and records," and thus

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8. The Attorney General also argues that the OCC's interpretation of § 484(a) is foreclosed by *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1924). In that case the Court upheld Missouri's enforcement of a state statute prohibiting national banks from establishing branches, reasoning that because the statute itself was valid and not preempted, "the corollary that it is obligatory and enforceable necessarily results . . . and, since the sanction behind it is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *Id.* at 659-60, 44 S.Ct. 213. The Court's opinion did not directly address the NBA's restriction of state visitorial powers. Moreover, at the time, national banks had not been authorized by federal law to establish branches. Thus, unlike this case, *St. Louis* did not involve a state law that affected a national bank's *powers* under the NBA.

enforcement of an otherwise non-preempted state "antiredlining" statute was barred by § 484(a), since such enforcement "no doubt would require examination of bank records"). Moreover, we are not prepared to conclude, as the Attorney General urges us to, that simply because a state statute is not substantively preempted by a contrary federal law, enforcement of that statute by state officials against national banks is necessarily permitted under § 484(a).

(ii)

The Attorney General maintains that even if his investigation may be construed as a visitation, it is nonetheless permitted under § 484's express exception for visitorial powers "vested in the courts of justice." To support this argument, the Attorney General relies primarily on what might be read as an alternative holding in *Guthrie*. Having concluded that the NBA's visitorial powers restriction did not foreclose a shareholder from seeking to enforce his common law right of inspection against a national bank, the Court in *Guthrie* observed that such inspection, "even if included in visitorial powers as the terms are used in the statute," would nevertheless "belong to that class 'vested in the courts of justice' which are expressly excepted from the inhibition of the statute." *Guthrie*, 199 U.S. at 159, 26 S.Ct. 4.

The Attorney General's proposed interpretation of the "courts of justice" exception cuts too broadly. If a state official could sidestep the Act's restriction on the

exercise of visitorial powers simply by filing a lawsuit, the exception would swallow the rule. Moreover, as we note above, the sovereign's bringing of an action in court was a primary means of exercising visitorial powers at common law. Because *Guthrie* involved a suit initiated by a private plaintiff, the *only* possible exercise of visitorial powers would have been by the court itself. *See Guthrie*, 199 U.S. at 158-59, 26 S.Ct. 4 ("The right of visitation [is] a *public* right. . . ." (emphasis added)). Whatever the scope of the courts of justice exception, it cannot be as broad as the Attorney General suggests, since that interpretation would provide no effective restriction on the exercise of a state's visitorial powers over national banks.

C

Since "Congress has not directly addressed the precise question[s] at issue," we proceed to step two of the *Chevron* framework, under which we ask "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. We will defer to an agency's statutory interpretation, so long as it is reasonable and does not conflict with Congress's expressed intent. *See id.* at 845, 104 S.Ct. 2778; *Skubel v. Fuoroli*, 113 F.3d 330, 336 (2d Cir.1997). An agency's interpretation may be reasonable, and thus worthy of deference, "even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005); *see also G & T*

Terminal Packaging Co., Inc. v. U.S. Dep't of Agriculture, 468 F.3d 86, 95 (2d Cir.2006) ("[U]nless we find the [agency's] construction of the statute to be arbitrary, capricious, or manifestly contrary to the statute, we must yield to that construction of the statute even if we would reach a different conclusion of our own accord." (internal quotation marks and citation omitted)).

The Attorney General makes two preliminary arguments for why we should not defer to the OCC's interpretation of § 484(a). Both were properly rejected by the district court. First, the Attorney General argues that the OCC's regulation, 12 C.F.R. § 7.4000, falls outside the scope of its delegated rulemaking authority. This argument fails because, as the district court pointed out, Congress conferred broad authority on the OCC to implement the NBA. *See* 12 U.S.C. § 93a. Accordingly, the Supreme Court has routinely deferred to the OCC's interpretations of that statute where Congress's intent is ambiguous:

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

NationsBank, 513 U.S. at 256-57, 115 S.Ct. 810 (internal quotation marks omitted). We see no reason to depart from this settled principle here.

Second, the Attorney General contends that no deference is owed to the regulation because it interprets purely legal concepts, as opposed to technical matters within the OCC's expertise. This contention is significantly more troublesome. We have previously observed that "an [administrative] agency has no special competence or role in interpreting a judicial decision." *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir.1997) (internal quotation marks and citation omitted).

The administrative record here consists almost entirely of the agency's interpretation of case law, legislative history, and statutory text. *See, e.g.*, 69 Fed.Reg. 1895, 1897-1900 (Jan. 13, 2004) (final rule); 64 Fed.Reg. 31749, 31751 (June 14, 1999) (NPRM). These are not subjects on which the OCC holds any special expertise, nor has the OCC identified any particularly technical aspect of the regulatory subject matter that the agency is " 'uniquely qualified' to comprehend." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)); *see also Watters*, 127 S.Ct. at 1584 (Stevens, J., dissenting). To warrant *Chevron* deference, we ordinarily require administrative agencies to "articulate a logical basis for their decisions, including a rational connection between the facts found and the choices made." *Skubel*, 113 F.3d at 336 (internal quotation marks omitted). Yet the OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states

through rulemaking lacking any real intellectual rigor or depth. Indeed, there is very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*. The OCC's analysis is at or near the outer limits of what *Chevron* contemplates.

Nevertheless, it does not follow that an agency's attempts to harmonize its rulemaking with judicial precedent—as the OCC has done here, *see, e.g.*, 69 Fed.Reg. 1895, 1897-1900—necessarily invalidate that rulemaking. *Cf. Long Island Care at Home, Ltd. v. Coke*, __ U.S. __, 127 S.Ct. 2339, 2350-51, 168 L.Ed.2d 54 (2007). We remain bound to uphold the agency's rule so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844, 104 S.Ct. 2778. Because we conclude that the rule the OCC adopted is not inconsistent with judicial precedent, the Attorney General's argument is unavailing.

Rather than analyzing the OCC's regulation in the abstract, we begin by emphasizing that the investigation and threatened enforcement action it would preclude in this instance concern real estate lending—precisely the same banking activity that was at issue in *Watters*. The authority of national banks to engage in that activity is a power that Congress has expressly granted under the NBA, subject to rules prescribed by the OCC. 12 U.S.C. § 371. It is thus "[b]eyond genuine dispute" that "state law may not significantly burden a national bank's own exercise of its real estate lending power, just as it may not curtail or hinder a national bank's efficient exercise of any other power, incidental or enumerated under the NBA." *Watters*, 127 S.Ct. at 1567.

In 2004, the OCC adopted a separate regulation detailing certain categories of preempted state law limitations on a national bank's real estate lending powers, including laws that concern licensing and registration, loan-to-value ratios, disclosure and advertising, and interest rates. 12 C.F.R. § 34.4(a). That same regulation also sets forth categories of state laws that "are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers." *Id.* § 34.4(b). These include contracts, torts, criminal law, zoning, and other broad subject areas that do not relate specifically to the business of banking. *Id.*

In addition to being unencumbered by state laws that are preempted, either by the NBA itself or by OCC regulations, "real estate lending, when conducted by a national bank, is immune from state visitorial control" as a result of § 484(a). *Watters*, 127 S.Ct. at 1567. Such immunity attaches not because of any specific conflict between state and federal law, but because "[t]he NBA specifically vests exclusive authority to examine and inspect in [the] OCC." *Id.* In this regard, the NBA's restriction on visitorial powers reflects Congress's overall judgment that, in the context of national bank regulation, "confusion would necessarily result from control possessed and exercised by two independent authorities." *Easton v. Iowa*, 188 U.S. 220, 232, 23 S.Ct. 288, 47 L.Ed. 452 (1903); *see Watters*, 127 S.Ct. at 1568.

Likewise, the OCC's regulation is "consistent with the intent of creating a national banking system that is subject to cohesive, uniform supervision by the primary regulator of national banks." 64 Fed.Reg. at 60095. In our reading, § 7.4000 does not, as the Attorney General suggests, claim for the OCC unfettered authority to preempt the states from enforcing their own laws or otherwise alter the role that states have traditionally occupied in our "dual banking system." *Cf. Atherton v. FDIC*, 519 U.S. 213, 221, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997); *Watters*, 127 S.Ct. at 1573 (Stevens, J., dissenting). Nor does the regulation change the extent to which national banks remain "subject to state laws of general application in their daily business." *Watters*, 127 S.Ct. at 1567; *see also Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103 (recognizing the power of states to regulate national banks "where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers"). Rather, the OCC's regulation simply confirms that where, as here, a state law specifically concerns "activities authorized or permitted pursuant to federal banking law," 12 C.F.R. § 7.4000(a)(2), its enforcement by state officials may constitute a prohibited visitation.

In drawing the lines that it did in § 7.4000(a), the OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute. As we have described above, the OCC's regulation furthers Congress's intent, through § 484(a) and other provisions of the NBA, to shield national banks "from unduly burdensome and duplicative state regulation" in the

exercise of their federally authorized powers, such as real estate lending. *Watters*, 127 S.Ct. at 1567. At the same time, it preserves state sovereignty by leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers, as well as by not preempting state laws—including New York State Executive Law § 296-a—that do not directly conflict with such powers. Such laws, we note, remain enforceable by private parties, as well as by the OCC itself.[9]

Furthermore, as the district court pointed out, the OCC's interpretation of § 484(a) as restricting the authority of states to enforce certain otherwise non-preempted laws finds support in another recent Congressional enactment, the Riegle-Neal Interstate Branch Banking and Efficiency Act of 1994. The Riegle-Neal Act permits national banks to establish interstate branches, and provides that such branches remain subject to "[t]he laws of the host State regarding community reinvestment, consumer protection, [and]

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9. Executive Law § 296-a authorizes a cause of action for private plaintiffs who are injured on the basis of a protected ground. *See, e.g., Dunn v. Fishbein*, 123 A.D.2d 659, 507 N.Y.S.2d 29 (N.Y.App.Div.1986). Although the issue is not before us, the parties do not dispute that private parties would remain free under the OCC's regulation to bring individual or, where appropriate, class actions against national banks to enforce compliance with non-preempted state laws, regardless of the subject matter such laws concern. This understanding, moreover, is consistent with *Guthrie*'s construal of the right of visitation as an essentially *public* right. *See Guthrie*, 199 U.S. at [illegible] 59, 26 S.Ct. 4.

fair lending," except when such laws are federally preempted or determined by the OCC to have a discriminatory effect on national banks. 12 U.S.C. § 36(f)(1)(A). However, the Act specifies that insofar as such state laws remain applicable, they "shall be enforced . . . by the Comptroller of the Currency." *Id.* § 36(f)(1)(B). We need not determine today whether, by this provision, Congress intended to make the OCC's enforcement authority exclusive with regard to interstate branches—a matter about which the OCC and the Attorney General, predictably, hold opposite views. It is sufficient to note that the Riegle-Neal Act, when read in conjunction with § 484(a), highlights the reasonableness of the OCC's interpretation concerning the scope of its exclusive visitorial powers.

Finally, we agree with the district court that the OCC permissibly interpreted the "courts of justice" exception under § 484(a) as pertaining only "to the powers inherent in the judiciary" and as not "grant[ing] state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(b)(2); *see OCC v. Spitzer*, 396 F.Supp.2d at 404-06. As we have indicated, the Attorney General's proposed interpretation of this exception would swallow the rule. The notion that the exception was intended to permit lawsuits, as opposed to administrative actions, appears particularly misguided since at the time the NBA was enacted, visitorial powers were primarily exercised

through the bringing of actions in court. *See, e.g., Guthrie*, 199 U.S. at 157, 26 S.Ct. 4 ("The visitation of civil corporations is by the government itself, through the medium of the courts of justice."); *see also OCC v. Spitzer*, 396 F.Supp.2d at 405.

By contrast, the OCC has put forth a more reasonable interpretation that comports with the text of the statute, as well as Congress's overall intent. The exception, as the OCC interprets it, confirms that § 484(a) does not strip the courts of any inherent authority they possess to issue subpoenas, for example, against a national bank, or to exercise jurisdiction over such a bank where it is otherwise proper to do so, simply because such acts in and of themselves might be considered "visitorial." *See, e.g., NLRB v. N. Trust Co.*, 148 F.2d 24, 29 (7th Cir.1945); *Overfield v. Pennroad Corp.*, 113 F.2d 6, 12 (3d Cir.1940). At the same time, the OCC properly determined that this exception does not positively grant authority to state officials to accomplish what § 484(a) otherwise forbids "by invoking the power of the courts." *OCC v. Spitzer*, 396 F.Supp.2d at 406.

We conclude that the district court did not err in deferring to the OCC's interpretation of § 484(a), as set forth in 12 C.F.R. § 7.4000. Because we are not prepared to conclude that the OCC's interpretation was arbitrary or otherwise not in accordance with law, the Attorney General's Administrative Procedure Act counterclaim fails. 5 U.S.C. § 706(2)(A); *see Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

We therefore affirm the declaratory and injunctive relief ordered by the district court in *OCC v. Spitzer*, 396 F.Supp.2d at 407-08.

IV

The Attorney General argues that even if he is precluded from enforcing New York State law against the national banks, under § 484(a) and § 7.4000, he nevertheless is permitted to bring an action against such banks to enforce the federal Fair Housing Act, in a *parens patriae* capacity.[10] The Attorney General first mentioned the FHA in his Answer to the OCC's complaint, and only later clarified that the basis for a potential suit under that statute might be his *parens patriae* authority. The district court concluded that whether or not a state attorney general has standing to sue under the FHA as *parens patriae*, such an action would constitute a visitation and would not fall within the exception in § 484(a) for visitorial powers "authorized by Federal law." *Clearing House v. Spitzer*, 394 F.Supp.2d at 620.

We note at the outset that the OCC did not address the issue of whether the FHA creates a federally authorized exception under § 484(a), and declined to

10. The FHA prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a).

take a position on this issue in the court below on the ground that it was not ripe for adjudication. In its brief to this Court, the OCC purports to have changed its mind regarding ripeness, and now aligns itself with Clearing House on the merits of the claim. We also note that while no party contested our jurisdiction over Clearing House's claim, the Attorney General did argue below that the court lacked subject matter jurisdiction. Moreover, we have an independent obligation to ensure that subject matter jurisdiction exists, and we therefore raise the issue *nostra sponte*. *Joseph v. Leavitt*, 465 F.3d 87, 89 (2d Cir.2006); *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 184 (2d Cir.2006).

We perceive two aspects to this question of jurisdiction. The first is whether Clearing House has properly grounded its complaint in a federal question, consistent with the "well-pleaded complaint" rule. *See Fleet Bank, Nat'l Ass'n v. Burke*, 160 F.3d 883, 886 (2d Cir.1998) (noting that the rule "requires a complaint invoking federal question jurisdiction to assert the federal question as part of the plaintiff's claim, and precludes invoking federal question jurisdiction merely to anticipate a federal defense" (internal citations omitted)). The second is whether the FHA issue is ripe for adjudication. *See United States v. Quinones*, 313 F.3d 49, 58 (2d Cir.2002) (observing that "[r]ipeness is a constitutional prerequisite to the exercise of jurisdiction by the federal courts" (internal quotation marks omitted)).

With regard to the first aspect, the district court correctly noted that "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); *see also Fleet Bank*, 160 F.3d at 888. Thus, the fact that the claim Clearing House is asserting might *also* serve as the basis for a defense to a potential state court action has no bearing on whether it has satisfied the well-pleaded complaint rule. *See Clearing House v. Spitzer*, 394 F.Supp.2d at 624-25. Moreover, since Clearing House seeks to prevent the Attorney General from enforcing one federal statute (the FHA) because such enforcement would conflict with another federal statute (the NBA), the issue of whether a federal question has been presented is even more straightforward than in cases such as *Fleet Bank* and *Shaw*, which involved actions brought to challenge the threatened enforcement of state laws by state officials.[11] *See id.* at 624; *see also Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 650-51, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) (Souter, J., concurring).

Somewhat more difficult is the issue of ripeness, which the district court did not address, but which we find necessary to consider given that the Attorney General has not yet filed a lawsuit against any national

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11. For the same reason, were the Attorney General to bring an action to enforce the FHA against a national bank in state court, the bank could unquestionably remove that action to federal court. *See* 28 U.S.C. § 1441; *cf. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

banks on the basis of the FHA. Under Article III, our jurisdiction "extend[s] to all Cases . . . [or] Controversies." U.S. Const. art. III § 2. We have observed that the purpose of the ripeness requirement is to ensure that a dispute has generated injury sufficient to satisfy the case or controversy requirement of Article III. *See Quinones*, 313 F.3d at 58 n. 5. This requirement "prevents a federal court from entangling itself in abstract disagreements over matters that are premature for review because the injury is merely speculative and may never occur." *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d at 90.

The Supreme Court has advised that ripeness questions are "best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Whether the Attorney General may sue to enforce the FHA against national banks depends on our interpretation of that statute's grant of standing, along with our understanding of § 484(a). Those questions might be viewed as purely legal ones which would not be significantly clarified by further factual development. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985); *Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507.

As to the second factor, however, we have serious doubts regarding any hardship that Clearing House might suffer were we to defer consideration of this issue.

If this were only a prudential matter, we might be inclined to afford greater weight to the first aspect of the ripeness inquiry. *Cf. Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 814-15, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (Stevens, J., concurring). In this case, however, the question of hardship for ripeness purposes coincides with the question of whether an "imminent injury in fact" has been established for purposes of standing. *See, e.g., MedImmune, Inc. v. Genentech, Inc.*, __ U.S. __ n. 8, 127 S.Ct. 764, 772 n. 8, 166 L.Ed.2d 604 (2007). The latter is an independent constitutional requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The district court held that Clearing House and its members had suffered injury because "[t]he threat of litigation in this case is not merely conjectural or hypothetical." *Clearing House v. Spitzer*, 394 F.Supp.2d at 626 (citing *O'Shea v. Littleton*, 414 U.S. 488, 496-97, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Although no enforcement action has yet been filed, the district court noted the Attorney General's stated intention to file such an action in the absence of an injunction, as well as his belief that the HMDA data are sufficient to establish a *prima facie* case of racial discrimination under both federal and state fair lending laws. *See id.*

The Supreme Court has recognized that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for

example, the constitutionality of a law threatened to be enforced." *MedImmune*, 127 S.Ct. at 772; *see also Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (holding that where a threat of prosecution is concrete and not merely speculative, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"). However, the various factors giving rise to that principle are mostly absent here. Because Clearing House challenges the Attorney General's right to enforce the FHA against its members, but does not contest the validity of the federal statute itself or its applicability to national banks, there is no risk that the threat of enforcement would chill conduct in which the banks could otherwise legally engage. *Cf. Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 478-79 (2d Cir.1999); *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41, 44 (2d Cir.1979).

Nor are Clearing House's members faced with the dilemma confronted in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), where to test the validity of an allegedly unconstitutional state regulation, the company would have been required to find an agent or employee to disobey the regulation at the risk of a fine or imprisonment. *Id.* at 145-46, 28 S.Ct. 441; *see also Yakus v. United States*, 321 U.S. 414, 437 38, 64 S.Ct. 660, 88 L.Ed. 834 (1944). Nor is this a situation in which compliance with a challenged law, prior to its enforcement, would force Clearing House's members to incur immediate expenses, make changes in their daily

activity, or otherwise would affect their "primary conduct." *Cf. Nat'l Park Hospitality Ass'n*, 538 U.S. at 810, 123 S.Ct. 2026; *Abbott Labs.*, 387 U.S. at 152-53, 87 S.Ct. 1507. As we have already emphasized, Clearing House and its members are required to abide by the fair lending provisions of the FHA regardless of whether the New York Attorney General has the authority to enforce those provisions.

Finally, we see no risk that, in the absence of an injunction, the Attorney General will continue to investigate Clearing House's members prior to filing an enforcement action. Under state law, the Attorney General has broad authority to investigate illegality as well as the power to issue subpoenas. McKinney's Exec. Law § 63(12); *see OCC v. Spitzer*, 396 F.Supp.2d at 388. No analogous pre-enforcement mechanism exists under the FHA, however, and the Attorney General does not contend otherwise. Should the Attorney General ultimately decide to pursue an action to enforce the federal statute, Clearing House could assert its objection immediately before a court, without subjecting itself to any punitive consequences.

For similar reasons, we see no contradiction between our decision to affirm the relief granted by the district court in *OCC v. Spitzer* and our determination that the FHA claim at issue is not ripe for adjudication. Although the Attorney General had not filed a lawsuit to enforce Executive Law § 296-a, the threat that he might do so became imminent when he issued letters of inquiry to the banks and their subsidiaries. Those letters—in which

the Attorney General threatened to invoke his subpoena power—required the banks to take affirmative steps in response or else risk finding themselves in violation of state law, despite their belief that the Attorney General's authority to enforce such law was federally preempted. Here, by contrast, the Attorney General never mentioned the FHA until after Clearing House filed this action. The Attorney General's mere assertion, made during trial, that he had the authority to bring a *parens patriae* action under the FHA did not result in any direct or immediate consequences and did not require Clearing House's members to alter their "primary conduct" in any way that would affect our ripeness analysis.

Because it was unripe, the district court lacked jurisdiction over Clearing House's claim regarding enforcement of the FHA. We therefore vacate the injunction against the Attorney General's enforcement of the FHA and remand the case to the district court to dismiss that claim. Prudential considerations also weigh in favor of this result. Despite the Attorney General's stated intentions at the outset of the litigation, it is not certain that he will file an enforcement action under the FHA against national banks now or in the foreseeable future. Since it is unclear what the precise contours of such an action would be, we are neither sure of the exact harm that might be alleged nor of the relief that might be sought.

Moreover, this Court has never had occasion to address the underlying question of whether a state attorney general has standing to sue as *parens patriae* under the FHA. *Cf. Support Ministries for Pers. With Aids, Inc. v. Vill. of Waterford*, 799 F.Supp. 272, 279 (N.D.N.Y.1992) (concluding that New York State had *parens patriae* standing to maintain a suit under the FHA); *Hous. Auth. of the Kaw Tribe of Indians of Okla. v. City of Ponca*, 952 F.2d 1183, 1195 (10th Cir.1991) (holding that a state housing authority could be considered a "person" for purposes of standing under the FHA). Though we do not believe it would be appropriate to do so in the first instance on the basis of the hypothetical action posited in this case, we note that both Congress and the Supreme Court have made clear that standing to sue under the FHA is extraordinarily permissive. *See infra.* As a result, the question of whether the NBA precludes state attorneys general from seeking to enforce the FHA against national banks is significantly more complicated than the district court's analysis suggests.

The FHA includes a broad remedial provision that allows any "aggrieved person" to bring an action in district court on the basis of a discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A). The Supreme Court has interpreted the language of this provision as evincing "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972) (internal quotation marks omitted); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (holding that a non-

profit organization had standing to sue under the FHA); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109-11, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (holding that a municipality had standing to sue as an aggrieved person under the FHA, and reiterating *Trafficante*'s broad interpretation of standing under the statute).[12] Congress itself "reaffirm[ed] the broad holdings of these cases" when it adopted amendments to the FHA in 1988. H.R.Rep. No. 100-711, at 23 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2184 (citing *Havens Realty* and *Gladstone*). As the district court recognized, we have generally interpreted such broad grants of standing as reflecting "Congressional intent to permit states to enforce the rights protected by federal statutes through *parens patriae* actions." *Clearing House v. Spitzer*, 394 F.Supp.2d at 628 (citing *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 121 (2d Cir.2002)). In light of these powerful indicators that Congress intended expansive standing to enforce the FHA, we are reluctant to consider arguments for restricting that standing on the basis of what is at best an incomplete record.

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12. At trial, the Attorney General maintained that he would have standing to sue under the FHA as an aggrieved person, based on the State's proprietary interests, as well as in a *parens patriae* capacity. Both Clearing House and the OCC agreed below that such a proprietary claim was not ripe, and the district court declined to consider it because it was "conjectural." *Clearing House v. Spitzer*, 394 F.Supp.2d at 627 n. 1. The Attorney General has not sought to revive this claim on appeal, and so we likewise decline to address it here.

For the foregoing reasons, we Affirm the district court's judgment in *OCC v. Spitzer*. We Affirm in part and Vacate in part the district court's separate judgment in *Clearing House v. Spitzer*, and we Remand with instructions for the district court to dismiss the Fair Housing Act claim for lack of subject matter jurisdiction.

CARDAMONE, *Circuit Judge, Concurring in part, and dissenting in part*:

By proscribing the enforcement of nonpreempted state law against national banks the Office of the Comptroller of the Currency, a bureau within the U.S. Treasury Department, has altered the compact between the state and national governments. That compact crafted by the framers of our Constitution envisioning two independent co-existing sovereigns will be dangerously weakened should this action by the Executive branch stand. A co-equal relationship between the two sovereigns was built into the frame of our republican form of government. Changing that status to one more akin to parent-child or employer-employee tips the federalism scales and strips the states of a portion of the residual sovereignty granted them under the Tenth Amendment by casting the states into a permanent junior or inferior position vis-à-vis the national government. Thus, if the power to alter the relationship between the state and federal government is established, it portends the power to destroy the constitutional concept of federalism, an indispensable component of our free society.

Appendix A

This case arose when the Attorney General of New York discovered significant disparities based on race in interest rates charged by some national banks and their state chartered subsidiaries operating in New York. He found, for example, minority borrowers at Wells Fargo Bank, J.P. Morgan Chase, Citigroup and HSBC paid higher rates of interest for mortgage loans than did white borrowers. If discrimination is proved, such conduct violates New York and federal law. Accordingly, the Attorney General launched an investigation into these banks' predatory practices. Plaintiffs the Clearing House Association, L.L.C. (Clearing House) and the Office of the Comptroller of the Currency (Comptroller or OCC) moved to enjoin the state Attorney General and obtained a trial on the merits in the United States District Court for the Southern District of New York (Stein, J.), at the conclusion of which Judge Stein ruled the Attorney General could not enforce New York's nonpreempted laws against a national bank. This ruling and the permanent injunction the district court later issued prompted the present appeal.

With respect to the majority's view of this appeal, I agree with my colleagues that we lack subject matter jurisdiction to review the Fair Housing Act issue in *Clearing House Ass'n, L.L.C. v. Spitzer* (*Clearing House v. Spitzer*), 394 F.Supp.2d 620 (S.D.N.Y.2005), and I concur in a remand. But, I respectfully dissent from that portion of the majority opinion affirming in part the district court's judgment in *Clearing House v. Spitzer* and affirming the court's separate judgment in *Office of the Comptroller of the Currency v. Spitzer* (*OCC v. Spitzer*), 396 F.Supp.2d 383 (S.D.N.Y.2005). I do not believe *Chevron* deference is

due to the promulgation by the OCC of 12 C.F.R. § 7.4000 barring New York State from enforcing its civil rights laws in this case.

DISCUSSION

I Federalism

A principal issue on this appeal is federalism, which is focused on the tension that exists, as here, when a state law and a federal regulation conflict. Federalism is built into the structure of our Constitution that establishes a system of dual sovereigns, that is, the state and the federal government. In the felicitous words of Chief Justice Salmon Chase, "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725, 19 L.Ed. 227 (1868). As James Madison, the father of the Constitution, wrote in an essay in support of the Constitution's adoption

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 303 (James Madison) (Sesquicentennial ed., 1937).

Appendix A

At the adoption of the Bill of Rights, the Tenth Amendment enshrined the concept of federalism: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Supreme Court believes that one of the great benefits of the federalist system is that it serves as a built in check on abuses of governmental power by a state or by the federal government, so long as there is a "healthy balance of power" between them. *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). The framers recognized that whatever state powers were surrendered to the new federal government, they were limited so as to be with respect to "certain enumerated objects only"; the states retained "a residuary and inviolable sovereignty over all other objects." The Federalist No. 39, at 249 (James Madison). Federalism assumes the state and federal governments have concurrent authority over the people, *Printz v. United States*, 521 U.S. 898, 919-20, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). Hence, in *Printz* the Supreme Court ruled it unconstitutional for Congress to commandeer the chief law enforcement officer of each local jurisdiction to conduct background checks of prospective handgun purchasers under the Brady Act. Such a command under the Act, the High Court ruled, violates states' residual sovereignty by compelling them to administer a federal regulatory program. *Id.* at 932-33, 117 S.Ct. 2365.

In the case at hand, we do not have the federal government compelling the states to take some action. Instead, we have a federal executive official—the Comptroller of the Currency—usurping "residual power reserved to the states." Here, the power usurped is the police power to investigate certain national banks and their operating subsidiaries doing business in New York allegedly guilty of discriminatory lending practices in the state.

In discussing federalism in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court observed the healthy balance between state and federal sovereignties is an obligation of all government officials. *Id.* at 578, 115 S.Ct. 1624. It is so vital in preserving our freedom that a court should not refuse to intervene when the federal or state government has "tipped the scales too far." *Id.* The record on this appeal reveals that an administrative official in the Executive branch—not Congress—has tipped the scales too far, which should in my view prompt us to intervene.

Appendix A

II Visitorial Power Under the National Bank Act

A. *National Bank Act*

I turn now to the statutory backdrop for this litigation. The National Bank Act, 12 U.S.C. § 21 *et seq.* (2001), first enacted in 1863 and reenacted in 1864, provides for the formation and regulation of national banks. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). Rather than displacing the state banking system, the National Bank Act established what has come to be known as the dual banking system, in which federal and state chartered banks coexist in relative "competitive equality." *See generally First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 131-33, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969). National banks are federal instrumentalities, in that they are organized and exist under the laws of the United States, but they are also privately owned businesses headquartered in a particular state and, in general, subject to the laws of that state. *See Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 361-62, 19 L.Ed. 701 (1869); *Guthrie v. Harkness*, 199 U.S. 148, 157, 26 S.Ct. 4, 50 L.Ed. 130 (1905); Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws*, 29 Harv. J.L. & Pub. Pol'y 981, 1002-03 (2006).

Appendix A

B. *Visitorial Power*

Section 484 of the National Bank Act provides that

> [n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

12 U.S.C. § 484(a) (2001). Whether New York State is attempting to exercise "visitorial powers" over national banks is a matter of controversy in this case. The American legal scholar Roscoe Pound traced the history of visitorial jurisdiction, beginning with canon law, from which the concept originated, when visitations by bishops to parishes took place to remedy abuses and to make sure church matters were handled decently and in order. In the common law America inherited from England all corporations are subject to visitation to ensure their abiding by the purposes of the charter that created them. Roscoe Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 Harv. L.Rev. 369 (1936).

Early interpretations of the term emphasized the supervisory nature of visitorial authority. *See, e.g., First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740 (1881), appeal dismissed, 106 U.S. 523, 1 S.Ct. 489, 27 L.Ed. 268 (1883). In *Guthrie*, the Supreme Court explained that visitation is the "act of a superior or superintending

officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance of its laws and regulations." 199 U.S. at 158, 26 S.Ct. 4; *see also Watters v. Wachovia Bank, N.A.*, __ U.S. __, 127 S.Ct. 1559, 1568, 167 L.Ed.2d 389 (2007) (same).

The state Attorney General has not expressed an interest in analyzing national banks' activities under their national banking charter, but instead is exercising his authority under the state's police power to investigate civil rights violations being committed by New York entities in New York. In response to troubling indicia of discrimination in the terms of mortgages issued in New York, *see generally* Manny Fernandez, *Racial Disparity Found Among New Yorkers with High-Rate Mortgages*, N.Y. Times, Oct. 15, 2007, at B1, the Attorney General asserts his right to conduct reasonable investigations of national banks—just as he does of other citizens located in New York—as part of his duty to enforce a state law of general application. Under § 296-a of New York's Human Rights Law it is an unlawful discriminatory practice for a bank to discriminate against an applicant for credit because of the applicant's "race, creed, color, national origin, . . ." N.Y. Exec. Law § 296-a (McKinney 2005). The statute expressly states the Human Rights Law "shall be deemed an exercise of the police power of the state" to protect "the public welfare, health and peace of the people of this state." *Id.* § 290(2).

Appendix A

C. *Authority of States to Enforce Nonpreempted State Laws Against National Banks*

While the precise contours of the term "visitorial powers" in the national banking context have not been fully delineated, it is clear that virtually from the inception of the National Bank Act the term was *not* understood to preclude state enforcement of nonpreempted state laws. *See Waite v. Dowley*, 94 U.S. 527, 528, 534, 24 L.Ed. 181 (1876) (affirming, in suit brought by town treasurer, state court judgment imposing penalty on national bank cashier for failing to comply with state law).

Considerable authority supports the proposition that states have the authority to enforce such laws against national banks. For example, the Supreme Court held in 1924 that the National Bank Act did not impede the ability of a state attorney general to bring an action against a national bank to enforce a valid state law prohibiting the establishment of branch banks. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659-60, 44 S.Ct. 213, 68 L.Ed. 486 (1924); *see also First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 421-22, 37 S.Ct. 734, 61 L.Ed. 1233 (1917) (considering and denying on merits state attorney general's *quo warranto* action testing authority of national bank to engage in trust services under state and federal law); *Minn. v. Fleet Mortgage Corp.*, 158 F.Supp.2d 962, 966 (D.Minn.2001) (holding that state could bring action to enforce state fraud and deceptive trade practice laws against national bank); *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d

406, 425-26 (Alaska 1982) (holding that state could sue national bank to enforce state consumer protection laws); *Peoples Savs. Bank v. Stoddard*, 359 Mich. 297, 102 N.W.2d 777, 782, 796-97 (1960) (applying, in suit brought by state attorney general, state antitrust law to national bank); *cf. Dickinson*, 396 U.S. at 129, 130, 138, 90 S.Ct. 337 (denying declaratory and injunctive relief to national banking association following state comptroller's letter requesting national bank to cease and desist activities prohibited by state law and incorporated into federal law under 12 U.S.C. § 36(c)); *Brown v. Clarke*, 878 F.2d 627, 629, 632 (2d Cir. 1989) (affirming, in suit brought by state banking commissioner, judgment barring national bank from engaging in branching activity prohibited by state law and incorporated into federal law under 12 U.S.C. § 36(c)); *Utah ex rel. Dep't of Fin. Insts. v. Zions First Nat'l Bank of Ogden*, 615 F.2d 903, 904, 906 (10th Cir.1980) (same); *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C.Cir.1967) (finding state banking commissioner could intervene in suit to enjoin Comptroller of Currency from authorizing national bank to open branch in contravention of state law as incorporated into federal law under 12 U.S.C. § 36(c)); *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71, 75 (5th Cir.1965) ("[W]here there is authority to proceed against national banking associations, even if in terms it is only authority to proceed against violations of state law, the subsumption of state substantive law as the regulating principle for national banking associations concerning branching carries with it the right of the State Superintendent of Banks to see to it that that substantive law is enforced.").

Not only have federal and state courts repeatedly affirmed the authority of states to enforce nonpreempted state law against national banks, Congress has also emphasized the importance of the dual banking system generally and, more specifically, the importance of the ordinary application of state laws to national banks. When Congress enacted the Riegle-Neal Interstate Banking and Branching Efficiency Act in 1994, it specifically subjected interstate branches of national banks to the laws of their host states in the areas of community reinvestment, consumer protection, fair lending, and intrastate branching. *See* 12 U.S.C. § 36(f) (2001). The House Conference Report stated that

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities.... Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities.

H.R.Rep. No. 103-651, at 53 (1994), as *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

Appendix A

III Section 7.4000 is Not Entitled to *Chevron* Deference

A. *Action of the OCC*

It is against this statutory and case law background that, in 1999, the Comptroller issued a revised regulation interpreting § 484's prohibition on the exercise of visitorial powers over national banks to preclude states from enforcing in court nonpreempted state laws. 12 C.F.R. § 7.4000. Rather than preempting state law, § 7.4000 preempts the ability of a state government to enforce concededly nonpreempted state law. By limiting the power of the state to enforce applicable state law and vesting that authority in a federal agency under § 7.4000, the usual constitutional balance of power between the states and the federal government is heavily tilted towards the federal government, and the Tenth Amendment is put in peril. Because there is no evidence that Congress planned for such a shift to occur, § 7.4000 must be set aside.

B. *Regulation Not Authorized Under the Supremacy Clause*

To avoid facing the conflict this regulation poses to the balance crafted by the Tenth Amendment, the majority applies to § 7.4000 the deferential review laid out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The majority's apparent assumption is that a federal regulation preempting a state's ability

to *enforce* state law is no more troubling or problematic than a regulation substantively preempting state law. I strongly disagree. By leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy. The likely result of which is a plain transgression on our republican form of government and a violation of the Tenth Amendment.

Further and significantly, the Supremacy Clause in article VI, clause 2 grants the power to preempt state law to the Congress, not to appointed officials in the Executive branch. Even when there is preemption by a federal agency, it may only occur within the scope of authority unmistakably delegated to it by Congress. Such authority does not exist here. In such cases, it is well established that an agency's construction of a statute that upsets the usual constitutional balance between federal and state powers is never entitled to deferential review under *Chevron. See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). Instead, the courts require a clear indication that Congress intended that result. *Id.* The requirement for a clear expression of congressional intent

> . . . stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually

> authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

Id. at 172-73, 121 S.Ct. 675; *see also Gregory*, 501 U.S. at 460-61, 111 S.Ct. 2395 ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

C. *Law Enforcement Core Aspect of State Sovereignty*

It is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws. "[T]he power to create and enforce a legal code, both civil and criminal is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986). The Supreme Court has repeatedly emphasized that states' ability to pass *and enforce* their own laws is an essential attribute of state sovereignty. *See, e.g., United States v. Wheeler*, 435 U.S. 313, 320, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) ("Each [state] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses."); *cf. Calderon v. Thompson*, 523 U.S. 538, 556, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)

("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.").

In criminal law, the doctrine of dual sovereignty has evolved to protect the substantial state interest in the enforcement of its criminal code. The Supreme Court has explained that separate federal and state prosecutions for the same unlawful act do not offend the Double Jeopardy Clause because "[f]oremost among the prerogatives of sovereignty is the power to create and enforce a criminal code" and "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." *Heath v. Alabama*, 474 U.S. 82, 93, 106 S.Ct. 433, 88 L.Ed.2d 387 (1985); *see also Bartkus v. Illinois*, 359 U.S. 121, 137, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959) (holding that a federal prosecution cannot "displace the reserved power of States over state offenses" and that the opposite result "would be in derogation of our federal system").

D. *St. Louis v. Missouri*

But it is not necessary to turn to the constitutional principles underlying the dual sovereignty doctrine to demonstrate that nonpreempted state laws may be enforced by a state against national banks. The Supreme Court has addressed this precise issue in a precedent that is now over eighty years old. In *St. Louis*, the attorney general of Missouri brought a *quo warranto*

proceeding in Missouri state court against a national bank alleging that the bank had violated a state law prohibiting the establishment of branch banks. 263 U.S. at 655, 44 S.Ct. 213. The national bank responded by asserting, *inter alia*, that, even if the state statute could be validly applied to a national bank, the state could not maintain a proceeding in court to enforce it. *Id.* at 655, 660, 44 S.Ct. 213. The Supreme Court soundly rejected this argument, stating

> . . . since the sanction behind [the state statute] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.

Id. at 660, 44 S.Ct. 213.

The majority's attempts to distinguish *St. Louis* are unavailing. Although *St. Louis* did not discuss the term "visitorial powers" by name, the result in that case would have been logically impossible were the OCC's interpretation of the term correct. In affirming Missouri's authority to enforce valid state laws against a national bank, the Supreme Court in *St. Louis* drew a distinction between permissible state action "to vindicate and enforce its own law," on the one hand, and

impermissible state action to "enforce a law of the United States" or "call the bank to account for an act in excess of its charter powers," on the other. *Id.* It is no coincidence that the state actions that the *St. Louis* Court indicated would be impermissible under the National Bank Act—actions to ensure that a national bank is complying with its charter or the law of its creation—line up precisely with the definition of "visitorial power" provided by the Court in *Guthrie*. *See Guthrie*, 199 U.S. at 158, 26 S.Ct. 4 (explaining visitation).

E. *Traditional Federal-State Balance Upset*

Not only does § 7.4000 upset the traditional federal-state balance by intruding upon a core state function, but it does so in a way that potentially blurs the distinct lines of political accountability between citizens and the federal and state governments.

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If . . . the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold

> accountable for the failure to perform a given function.

Lopez, 514 U.S. at 576-77, 115 S.Ct. 1624 (Kennedy, J., concurring). By keeping state law in effect, but removing from state executives the power to enforce that law in court, § 7.4000 confuses which governmental entity citizens should hold accountable for the enforcement of state laws against national banks. If the OCC fails adequately to enforce state law against national banks, state officials could bear the brunt of public disapproval while federal officials remain insulated from the electoral ramifications of their enforcement policies. *Cf. New York v. United States*, 505 U.S. 144, 169, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) (raising parallel concern in context of federal legislation compelling states to regulate disposal of radioactive waste). "Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not preempted by federal regulation." *Id.*

Similarly, the federal government is unlikely to be as motivated or as effective as the states in responding to the complaints of a particular state's citizenry regarding the enforcement of that state's laws. Here, *amici* for appellant echo numerous state officials, consumer groups and academic authors in expressing concern that the OCC may lack the capability and commitment to protect consumers with the vigor applied by state attorneys in the past. *See, e.g.*, U.S. Gen. Accounting Office, OCC Consumer Assistance: Process

is Similar to That of Other Regulators but Could be Improved by Enhanced Outreach 23-24 (2006) (noting concerns of local officials and consumer group representatives); Fisher, *supra*, at 1006 (commenting on state officials' proactive enforcement of consumer protection statutes in cases that federal agencies were "unable or unwilling" to pursue).

Perhaps of most concern is the role § 7.4000 gives to a federal agency in shaping state policy. While the regulation does not mandate that a state legislature institute a particular regulatory regime, there is no doubt that the ultimate contours of state policies will be shaped by the decisions the OCC makes regarding how to—and how not to—enforce state laws against national banks. As the Supreme Court has observed, "[e]xecutive action that has utterly no policymaking component is rare." *Printz*, 521 U.S. at 927, 117 S.Ct. 2365.

In light of the implications that § 7.4000 has for state sovereignty and the core state function of the enforcement of valid state law, a clear statement of congressional purpose to do so is necessary to support the OCC's interpretation of the term visitorial powers. Because Congress has provided no such indication, the regulation should be set aside and the district court's judgments in *OCC v. Spitzer*, *supra*, and *Clearing House v. Spitzer*, *supra*, vacated.

Appendix A

IV *Watters* Decision

Finally, the Supreme Court's recent decision in *Watters* does not lead to a contrary result. In *Watters*, the Supreme Court confronted the question of whether a state can exercise visitorial powers over national bank operating subsidiaries. 127 S.Ct. at 1564. There was no question that the state statute at issue in that case constituted an exercise of visitorial power over such subsidiaries. *Id.* The statute attempted to empower the state banking commissioner with general supervision and control over the operating subsidiaries and subjected them to various licensing, registration, and inspection requirements. *Id.* at 1565-66. In finding that the National Bank Act's prohibition on the exercise of visitorial powers applied to national bank subsidiaries to the same extent that it applied to national banks, *Watters* reaffirmed the basic principle that "when state prescriptions significantly impair the exercise of [the national bank's] authority, enumerated or incidental under the NBA, the State's regulations must give way." *Id.* at 1567.

Watters thus concerned the relatively familiar case in which a state statute was substantively preempted by federal law. The questions raised by the regulation at issue in this case are very different. Here, there is no dispute that Congress could—but has chosen not to—preempt the state law that the New York Attorney General is attempting to enforce. The crucial question is rather whether the OCC can interpret the National Bank Act to limit state regulation of national banks *in*

this way. This case calls on this Court to determine whether Congress aimed to vest the enforcement of valid state law against national banks entirely in the hands of a federal agency. As the majority concedes, *Watters* had no occasion to address directly this unique and complex question.

CONCLUSION

Accordingly, for the reasons stated above, § 7.4000 should be set aside and *OCC v. Spitzer*, *supra*, and *Clearing House v. Spitzer*, *supra*, vacated. Thus, while I concur in the majority's determination that the Fair Housing Act claim in *Clearing House v. Spitzer*, should be dismissed, I respectfully dissent from that part of the majority's decision that affirms the district court judgments.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 12, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5636 (SHS)

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff,

-against-

ELIOT SPITZER, in his official capacity as
Attorney General for the State of New York,

Defendant.

OPINION AND ORDER

SIDNEY H. STEIN, U.S.District Judge.

This is an action by the Office of the Comptroller of the Currency (the "OCC") seeking declaratory and injunctive relief barring the Attorney General of the State of New York from infringing on the OCC's exclusive visitorial authority over national banks and

their operating subsidiaries.[1] The OCC is the federal agency with primary responsibility for supervising national banks. This litigation was prompted by the Attorney General's investigation into whether the residential mortgage lending practices of several national banks doing business in New York was racially discriminatory. The OCC does not challenge the applicability of the state's anti-discrimination law to national banks' lending practices, nor does it question whether national banks must comply with state fair lending laws. Rather, this action addresses only the question of whether the Attorney General of the State of New York may enforce those laws against national banks.

The OCC contends that the Attorney General's assertion of authority pursuant to state law to conduct his investigation and enforce relevant laws is in conflict with, and thus preempted by, section 484 of the National Bank Act, 12 U.S.C. § 484(a), and the OCC's implementing regulation codified at 12 C.F.R. § 7.4000, which gives the OCC exclusive authority to investigate national banks and prosecute enforcement actions to

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1. The U.S. Court of Appeals for the Second Circuit recently affirmed the validity of OCC regulations permitting national banks to conduct banking activities through operating subsidiaries and providing that those operating subsidiaries are subject to state laws to the same extent as are national banks. *See Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 321 (2d Cir.2005), *petition for cert. filed*, No. 05-431 (Sept. 30, 2005); *see also* 12 C.F.R. § 7.4006. Thus, for simplicity's sake, unless otherwise specified, the Court refers to national banks and their operating subsidiaries collectively as "national banks."

compel their compliance with state and federal laws regulating the content or conduct of federally authorized banking activities. The Attorney General challenges the validity of the OCC's interpretation of section 484, and claims that even if the OCC's regulation is valid, he is authorized to enforce fair lending laws against national banks pursuant to the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* The Attorney General also asserts a counterclaim pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A) and (C), that seeks an order setting aside 12 C.F.R. § 7.4000 insofar as it prohibits states from enforcing non-preempted state laws against national banks and their operating subsidiaries.

As explained more fully below, this Court finds that the OCC acted within its statutory authority in promulgating 12 C.F.R § 7.4000; the regulation, as recently amended, reflects a permissible construction of section 484 of the National Bank Act; and the regulation is therefore entitled to deference and, pursuant to the U.S. Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is to be given "controlling weight." *Id.* at 844, 104 S.Ct. 2778. The Court also finds that the Attorney General's assertion of visitorial authority impermissibly interferes with the OCC's supervisory role. Accordingly, the OCC's application for declaratory and injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure is granted and the Attorney General is permanently enjoined from issuing subpoenas or

demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

This opinion says nothing about whether it is better public policy to vest visitorial powers over national banks in state attorneys general as well as in the OCC. That is a matter for the legislative and executive branches of government to determine. What this opinion does conclude is that the federal statutes, regulations and decisional authority as they now exist compel the conclusion that the New York State Attorney General may not exercise visitorial powers over national banks in connection with an investigation into the banks' residential lending practices.

* * *

I. Background

A. Procedural Background

On June 16, 2005, the OCC commenced this action by filing a complaint and motion for a preliminary injunction. On the same day, The Clearing House Association, L.L.C. filed a separate complaint and motion for a temporary restraining order and

preliminary injunction seeking a similar order enjoining the Attorney General's investigation and asserting the same grounds for relief. *See The Clearing House Association, L.L.C. v. Spitzer*, No. 05 Civ. 5629(SHS). Following oral argument four days later, this Court denied the plaintiff's request for a temporary restraining order in *The Clearing House Association, L.L.C. v. Spitzer*, No. 05 Civ. 5629(SHS). The two actions were accepted as related, and the Court subsequently set a coordinated briefing schedule and consolidated the trials on the merits with the hearings on the preliminary injunction applications pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. (Order, dated July 5, 2005). The trial on the merits was held in both actions on September 7, 2005, at which time argument was heard and affidavits and other exhibits were admitted into evidence. (Transcript, dated Sept. 7, 2005, at 36-37).[2]

B. Factual Background

This action arises in response to the Attorney General's investigation into the residential mortgage

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2. Various associations and institutions have submitted briefs *amici curiae* in connection with this and the related action. The National Community Reinvestment Coalition, together with fifteen other interested organizations; the National Association of Realtors and New York State Association of Realtors, Inc.; the Greenlining Institute; and Thirty State Attorneys General all submitted memoranda opposing the OCC's requested relief. The American Bankers Association, Consumer Bankers Association, and the Financial Services Roundtable jointly submitted a memorandum in support of the OCC.

lending practices of a number of banks doing business in New York State, including several national banks and their operating subsidiaries. The Attorney General's inquiry began with a review of data made available pursuant to the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810, which requires residential real estate lenders to compile certain information regarding their mortgage lending activities and to make that information available to the public. *See* 12 U.S.C. § 2803.

Upon a preliminary analysis of 2004 data from several national banks and their mortgage lending operating subsidiaries, Attorney General Spitzer found evidence that he believes shows that differences in the prices of home loans may have been based on the race of the borrower, and concluded that the data was sufficient to establish a *prima facie* case of race discrimination in violation of federal and state fair lending laws. (*See* Declaration of Dennis D. Parker in Supp. of Def.'s Opp to Pls.' Request for Injunctive and Declaratory Relief and in Supp. of Counterclaim, dated August 5, 2005, ("Parker Decl."), at ¶ 5).

In April 2005, the Attorney General sent letters of inquiry to several national banks, including Citibank, N.A., JP Morgan Chase Bank, N.A., HSBC Bank USA, N.A., and Wells Fargo Bank, N.A., informing the banks that he had commenced a preliminary inquiry into each bank's lending practices, advising them that racial disparities in their loan rates "might indicate a violation of state and federal laws prohibiting discrimination in lending," and requesting certain non-public lending

information. (*See* Parker Decl. at ¶ 6, 7, and Ex. 2; *see also* Decl. of Grace E. Dailey, dated June 16, 2005, at ¶ 5). In the letters to Wells Fargo, HSBC, and JP Morgan Chase, the Attorney General cited New York Executive Law § 296-a and the federal Equal Credit Opportunity Act as potentially applicable anti-discrimination laws. (*See* Ex. 2 to Parker Decl.). The letters requested that "[i]n lieu of issuing a formal subpoena . . . ," the banks "voluntarily provide" certain non-public lending information. (*Id.*).

The Attorney General asserts the authority to conduct such investigations and bring appropriate enforcement actions pursuant to New York statutory and common law. Specifically, section 63(12) of the New York Executive Law gives the Attorney General the authority to investigate and prosecute instances of "persistent fraud or illegality in the carrying on, conducting or transaction of business. . . ." *See* McKinney's Exec. Law § 63(12). In furtherance of an inquiry into "persistent fraud or illegality," the Attorney General has the power to issue subpoenas. *See id.*

In response to the letters from the Attorney General, the OCC instituted this action on the grounds that the Attorney General's investigation impermissibly intrudes on the OCC's exclusive visitorial authority over national banks. The Attorney General has reaffirmed his intention to go forward with his investigation and enforcement actions in the event he is not enjoined from doing so. (*See* Transcript, dated Sept. 7, 2005, at 38).

Appendix B

In his opposition to the OCC's motion, the Attorney General raised, for the first time, a claim that he may bring enforcement actions against national banks pursuant to the federal Fair Housing Act, (the "FHA"), which he asserts creates a federally authorized exception to section 484's general limitation on states' visitorial powers. *See* 12 U.S.C. § 484(a) (limiting the exercise of visitorial powers, "except as authorized by Federal law: . . ."). The Attorney General also contends that the FHA reveals an intent by Congress to permit multiple levels of enforcement of fair lending laws, rendering the OCC's interpretation of section 484 unreasonable insofar as it prohibits states from enforcing fair lending laws. The OCC disagrees with the Attorney General's argument regarding Congressional intent, insisting that its interpretation of section 484 is not in conflict with any policy expressed by the FHA. It also notes that none of the enforcement provisions of the FHA on their face apply to the Attorney General, but the OCC does not seek a determination as to the Attorney General's authority to bring any particular type of action pursuant to the FHA.[3] Accordingly, here,

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3. The OCC acknowledges that the FHA authorizes the federal Secretary of Housing and Urban Development and the *United States* Attorney General to visit and take enforcement actions against national banks. (*See* OCC's Reply Mem at 10, n.9). It asserts, however, that section 3613 of the FHA, 42 U.S.C. § 3613, which provides a private right of action for aggrieved persons, "by its terms contains no authorization" for the Attorney General's actions. (*See id.*, at 10, n. 8). The OCC also notes that the Attorney General is not certified to receive referrals pursuant to section 3610(f) of the FHA, 42 U.S.C. § 3610(f). (*Id.*).

the Court considers only the Attorney General's contention that the national policy expressed in the FHA mandates a reading of the National Bank Act that would permit him to enforce fair lending laws against national banks.[4]

II. Subject Matter Jurisdiction

This Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 because this action arises under the Supremacy Clause of the U.S. Constitution and the National Bank Act. *See Fleet Bank Nat'l Ass'n v. Burke*, 160 F.3d 883, 892-93 (2d Cir.1998); *see also First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132, 140 (D.Conn.1999). Because the OCC is part of the United States Department of Treasury, this Court also has jurisdiction pursuant to 28 U.S.C. § 1345, which provides federal jurisdiction over all actions commenced by an agency of the United States. 28 U.S.C. § 1345; *see also* 12 U.S.C. § 93(d); *Fed. Sav. & Loan Ins. Corp. v. Tr[illegible]tin*, 490 U.S. 82, 85, 109 S.Ct. 1626, 104 L.Ed.2d 73 (1989).

III. The National Banking Statutory and Regulatory Scheme

National banks are created and governed by the National Bank Act, 12 U.S.C. §§ 21 *et seq.*, originally

4. The plaintiff in the related action seeks an injunction barring the Attorney General from proceeding with an action in his *parens patriae* capacity pursuant to the FHA, and accordingly, the issue is addressed there.

enacted in 1864. *See* Act of June 3, 1864, 38th Cong. ch. 106, 13 Stat. 99. The National Bank Act authorizes national banks to engage in various banking activities and "to exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . ." 12 U.S.C. § 24(Seventh). Additionally, Congress has expressly authorized national banks to engage in residential lending subject to restrictions and requirements prescribed by the OCC. 12 U.S.C. § 371(a).[5]

"National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis v. Elmira Sav. Bank,* 161 U.S. 275, 283, 16 S.Ct. 502, 40 L.Ed. 700 (1896). They remain subject to state laws, but only insofar as those laws do not "prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County v. Nelson,* 517 U.S. 25, 33, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996). Moreover, in order to "prevent

5. Section 371(a) provides that "[a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests on real estate, subject to section 1828(*o*) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." 12 U.S.C. § 371(a). Section 1828(*o*) in turn directs federal banking regulators, including the OCC, to promulgate safety and soundness standards applicable to real estate lending. *See* 12 U.S.C. § 1828(*o*). The regulatory standards promulgated by the OCC governing national banks' real estate lending practices are set forth in 12 C.F.R. 34, Subpart D, Appendix A.

inconsistent or intrusive state regulation from impairing the national system," the National Bank Act specifically limits states' ability to exercise supervisory authority over national banks. *See Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311-12 (2d Cir.2005) (citing 12 U.S.C. § 484(a)), *petition for cert. filed*, No. 05-431 (Sept. 30, 2005). In the provision at the center of this litigation-12 U.S.C. § 484(a)-the National Bank Act provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress . . .

12 U.S.C. § 484(a) (referred to as "section 484"). Section 484 as currently codified remains substantially the same as it was when originally enacted 141 years ago. *See* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116.[6]

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6. The Act of June 3, 1864 was designated the "National Bank Act" by Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123, 123 (codified at 12 U.S.C. § 38). The visitorial powers provision was codified together with examination provisions at Section 5240 of the Revised Statutes of the United States in 1875. It has subsequently been recodified and amended, in 1913 and again most recently in 1982, when section 484(b) was added to provide a narrow exception allowing appropriate state officials to review a bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws." *See* 12 U.S.C. § 484(b); *see also* Garn-St. Germain Depository Institutions Act of 1982, 97 Pub.L. 320, § 412, 96 Stat. 1469, 1521 (1982).

Appendix B

The OCC is the federal agency entrusted with the "primary responsibility for surveillance of 'the business of banking' authorized by § 24 Seventh." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995). The OCC has recently amended its regulation clarifying the scope of section 484's limitation on the exercise of visitorial powers over national banks and the meaning of the exception for those powers vested in the courts of justice. That OCC regulation is codified in the Code of Federal Regulations at 12 C.F.R. § 7.4000. In that regulation, the OCC defines "visitation" to include: "(i) [e]xamination of a bank; (ii)[i]nspection of a bank's books and records; (iii)[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv)[e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. § 7.4000(a)(2)(i)-(iv). The regulation construes section 484 of the National Bank Act as vesting the OCC with "exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law," unless federal law provides otherwise. 12 C.F.R. § 7.4000(a)(3). Finally, section 7.4000(b)(2) clarifies the "courts of justice" exception to section 484's general limitation on visitorial powers, explaining that:

> This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with

> respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

12 C.F.R. § 7.4000(b)(2).

As is evident by the plain terms of this regulation, the Attorney General's assertion of authority pursuant to state law to investigate and enforce national banks' compliance with federal or state laws regulating their conduct of residential mortgage lending-in the absence of any exception provided by federal law—is in direct conflict with section 484 as clarified by 12 C.F.R. § 7.4000(a). Section 7.4000(b)(2) prevents the Attorney General from invoking the courts of justice exception to enforce fair lending laws through judicial proceedings. Except insofar as he claims a right to proceed pursuant to the federal Fair Housing Act, the Attorney General does not dispute that 12 C.F.R. § 7.4000 would bar his investigation and threatened enforcement actions. The Attorney General does, however, assert that 12 C.F.R. § 7.4000 represents an impermissible construction of section 484, which, he claims, is to be accorded no deference by this Court.

IV. Discussion

Because the Attorney General challenges the OCC's interpretation of section 484 of the National Bank Act as reflected in 12 C.F.R. § 7.4000, a threshold question for the Court is whether the OCC's interpretation should be given deference—indeed, controlling weight—under

the familiar framework set forth by the U.S. Supreme Court some two decades ago in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and known as the *Chevron* framework.

A. The *Chevron* Framework

Pursuant to the *Chevron* doctrine, if an implementing agency's regulations are challenged, a court must first inquire whether "the intent of Congress is clear" as to "the precise question at issue." *Chevron,* 467 U.S. at 842, 104 S.Ct. 2778. If Congress has spoken clearly, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" *NationsBank,* 513 U.S. at 257, 115 S.Ct. 810 (quoting *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778). As the Supreme Court has observed,

> It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.

> The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 403-04, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987) (quotations and citation omitted). When the OCC implements a provision of the National Bank Act "in accord with the legislature's intent," that interpretation is entitled to deference. *See NationsBank*, 513 U.S. at 259, 115 S.Ct. 810; *see also Wachovia*, 414 F.3d at 321. Accordingly, if there is ambiguity in section 484's reference to visitorial powers, or its courts of justice exception, this Court must "give great weight to any reasonable construction" of those terms by the OCC. *Clarke*, 479 U.S. at 403, 107 S.Ct. 750; *see also Wachovia*, 414 F.3d at 315.

B. No Clear Statement Is Required

As a preliminary matter, the Court addresses the Attorney General's contention that a clear statement of Congressional intent to preempt state visitorial power in the manner effected by 12 C.F.R. § 7.4000 is necessary in order to affirm the validity of that regulation. The Attorney General posits that this clear statement is necessary because the OCC's interpretation of section 484 interferes with the traditional state interest in enforcing its own laws, and in protecting its citizens from discriminatory conduct. A similar argument was raised in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d

Cir.2005), and rejected there by the U.S. Court of Appeals for the Second Circuit. For the reasons articulated in *Wachovia,* the argument is equally unavailing here.

Preemption, which finds its roots in the Supremacy Clause of the U.S. Constitution, generally occurs in one of three ways: where Congress expressly preempts state law; where Congress legislates so comprehensively as to occupy an entire field, leaving no room for state law; or where federal law conflicts with state law. *See Fid. Fed. Sav. & Loan Ass'n v. de da Cuesta,* 458 U.S. 141, 152-53, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982); *see also* U.S. Const. art. VI. cl. 2. "Federal regulations have no less pre-emptive effect than federal statutes," *de la Cuesta,* 458 U.S. at 153, 102 S.Ct. 3014, and "federal courts have recognized that the OCC may issue regulations with preemptive effect." *Wachovia,* 414 F.3d at 314. This case, just as *Wachovia,* involves an instance of "conflict preemption" that arises where " 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Wachovia,* 414 F.3d at 313-14 (quoting *de la Cuesta,* 458 U.S. at 153, 102 S.Ct. 3014). As the Supreme Court observed, " '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *de la Cuesta,* 458 U.S. at 153, 102 S.Ct. 3014 (quoting *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962)).

Appendix B

In *Wachovia,* the Second Circuit expressly rejected a claim that a "clear statement" was necessary where OCC regulations purportedly infringed on an area of traditional state authority. The Second Circuit acknowledged that courts will typically apply a presumption against preemption in areas of traditional state authority, but explained that " '[t]he presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.' " *Wachovia,* 414 F.3d at 314 (quoting *Flagg v. Yonkers Sav. & Loan Ass'n,* 396 F.3d 178, 183 (2d Cir.2005), *cert. denied,* __ U.S. __, 126 S.Ct. 343, 163 L.Ed2d 55 (2005)); *see also Wells Fargo Bank N.A. v. Boutris,* 419 F.3d 949, 956-57 (9th Cir.2005). There is no distinguishing circumstance present here that warrants a departure from the approach the Second Circuit followed in *Wachovia* just a few months ago. Accordingly, here, as in *Wachovia,* the proper focus is "on the reasonableness of the OCC's exercise of its regulatory authority." 414 F.3d at 315.

The Attorney General contends that rather than giving deference to the OCC's own interpretation of section 484, a heightened degree of judicial skepticism should be applied because 12 C.F.R. § 7.4000 represents a jurisdictional "power-grab." (Def's Mem. of Law in Opp. to Pls.' Request for Declaratory and Injunctive Relief and in Support of Counterclaim, at 34). *Compare Natural Resources Defense Council v. Abraham,* 355 F.3d 179, 199 (2d Cir.2004) (critically viewing agency's

attempt to circumvent limitations placed on the exercise of its discretion) with *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C.Cir.1994) (affording *Chevron* deference to regulation over objections that it improperly expanded the agency's jurisdiction). That argument fails as well. Here, the OCC has interpreted undefined terms in its organic statute in order to clarify existing ambiguity and provide certainty to affected parties. This Court can find no valid basis for distinguishing between the effect on the OCC's jurisdictional reach resulting from the amendments to 12 C.F.R. § 7.4000 and that arising from the related operating subsidiary regulations recently affirmed by the Second Circuit in *Wachovia*. *Wachovia*, 414 F.3d at 321.[7] Because there is no basis for departing from the traditional *Chevron* framework, the Court now proceeds with that analysis.

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7. In response to proposed amendments preceding the OCC's adoption of the operating subsidiary regulations at issue in *Wachovia*, the OCC received comments opposing its assertion of exclusive authority over those banks, similar to comments received in opposition to the 2004 amendments to 12 C.F.R. § 7.4000. *See e.g.*, Bank Activities and Operations, 69 Fed.Reg. 1895, 1896, 1903 (Jan 13, 2004) (announcing final rule amending visitorial powers provision); Investment Securities; Bank Activities and Operations; Leasing, 66 Fed.Reg. 34,791, 34,788 (July 2, 2001) (announcing final rule providing that operating subsidiaries are subject to state laws to the same extent as national banks).

C. Congress Has Not Unambiguously Addressed the Precise Questions at Issue

The Court now turns to step one of the *Chevron* framework: determining whether Congress has addressed the "precise question[s] at issue." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. In making this determination, a court employs the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 842-43, n. 9, 104 S.Ct. 2778. In this analysis, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning-or ambiguity—of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000).

The precise questions at issue here are (1) whether through section 484's limitation on visitorial powers, Congress intended to preclude state officials from enforcing non-preempted state laws that regulate the conduct of a national bank's federally authorized banking activities; and (2) whether the courts of justice exception was intended to permit state officials to utilize the courts to exercise otherwise prohibited visitorial power over national banks. Although section 484 plainly confines the exercise of visitorial authority over national banks to that authorized by federal law, and other provisions in the National Bank Act vest the OCC with the primary supervisory authority over national banks, nowhere does the Act precisely define the scope of the OCC's exclusive visitorial powers or the reach of the

courts of justice exception. *See e.g.*, 12 U.S.C. §§ 93a, 481, 484 and 1818.

The Attorney General raises two central arguments as to why the statute unambiguously contravenes the OCC's interpretation as reflected in 12 C.F.R. § 7.4000; the first is based on the text of the original visitorial powers provision, and the second on his reading of the Supreme Court's decision in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1924). The Court addresses each in turn.

1. The Statutory Text Does Not Unambiguously Contravene the OCC's Construction of Section 484

The Attorney General asserts that when section 484 is read in context, it is evident that Congress intended that the limitation on visitorial powers would encompass only direct supervisory authority aimed at ensuring the safety and soundness of national banks, and that Congress did not intend to preclude state law enforcement officials from enforcing general state laws that were applicable to national banks.

The Attorney General begins with the word "other" as used in the original visitorial powers provision, which provided that the national banks "shall not be subject to any *other* visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." Act of June 3, 1864, ch. 106, § 54, 13 Stat. at 116 (emphasis added). He contends that

the reference to "other" visitorial powers refers only to those powers granted to the OCC in the immediately preceding sentences of the original Act, including the powers to examine the affairs of banking associations; to examine their officers and agents; and to make full and detailed reports of the associations' condition. The Attorney General notes that consistent with the original statute, the language of section 484 has been altered only slightly and remains in a subchapter of the National Bank Act entitled, "Bank Examinations." *See* Subchapter XV, Title 12 of the U.S.Code. The surrounding sections of the subchapter cover specific bank examination matters, including appointment and payment of examiners, special examinations and waivers of examination requirements. 12 U.S.C. §§ 481-483, 485-486. Thus, the Attorney General insists that the limitation on visitorial powers is intended to limit state *administrative* officials from directly supervising national banks, and is not intended to preclude state officials from enforcing generally applicable state laws, particularly through actions in the courts.

The visitorial powers provision as originally enacted, however, refers not simply to visitorial powers "other" than the ones in the same section, but to visitorial powers "other" than those authorized by "this act." *See* Act of June 3, 1864, ch. 106, at § 54. The Attorney General's statutory reading ignores a provision in the original Act vesting the OCC with the authority to exercise visitorial powers by bringing judicial proceedings in the courts. *See* Act of June 3, 1864, ch. 106, § 53, 13 Stat. 110; *see also* 12 U.S.C. § 93(a). Moreover, section 484 in its

current form contains no reference to nearby provisions or to any other specific provisions in the National Bank Act, but states rather simply that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," or those exercised or directed by Congress. 12 U.S.C. § 484(a). Thus, the Court does not find any clear intent of Congress reflected in either the original visitorial powers provision, or in its current form, to refer only to direct supervision and regulation by administrative officials of laws directly touching on concerns about the safety and soundness of the banks.

The Attorney General also posits that the exception for those powers "vested in the courts of justice" speaks for itself, unambiguously permitting state officials to bring enforcement actions in the courts to enforce applicable state or federal laws. Here again, the Court disagrees. Nothing in the text of section 484 or the surrounding provisions indicates that Congress intended the courts of justice exception to preserve the ability of states to enforce laws regulating national banks' activities by instituting judicial proceedings. The statute therefore neither unambiguously requires that the general law enforcement officials of states be permitted to enforce state laws regulating the business of banking, nor unambiguously permits states to bring judicial actions to enforce such laws pursuant to the courts of justice exception.

2. *First National Bank in St. Louis v. Missouri* Does Not Preclude the OCC's Assertion of Exclusive Authority to Enforce State Laws Regulating National Banks' Authorized Banking Activities

The Attorney General asserts that in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640, 44 S.Ct. 213, 68 L.Ed. 486 (1924), the U.S. Supreme Court conclusively established that states could sue national banks to enforce non-preempted state laws. However, the Attorney General overstates the holding of *St. Louis* as applied in the current context of national banking regulation.

The first question addressed in *St. Louis* was whether the National Bank Act permitted national banks to create intrastate branches, and the Court held that it did not. 263 U.S. at 658-59, 44 S.Ct. 213. Because federal law did not permit branches, the Court concluded that a Missouri law prohibiting branches was not preempted and could be enforced against national banks. *Id.* at 659, 44 S.Ct. 213. The Court also reasoned that because the Missouri law applied, to deny the state the ability to enforce it would involve "a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *Id.* at 660, 44 S.Ct. 213. It further observed that ". . . since the sanction behind [the anti-branching law] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." *Id.* In concluding

that the state could enforce its own law, the Court did not limit its holding to the type of enforcement action in that case—a *quo warranto* action to determine the applicability of the state law and to prohibit the bank from violating it—but stated that "the power of the State to enforce [the state law] being established, the nature of the remedy to be employed is a question for state determination." *Id.* at 660-61, 44 S.Ct. 213. Seizing on the *St. Louis* Court's recognition that the state was the only proper party with the authority to enforce the applicable state law, the Attorney General insists that *St. Louis* conclusively held that section 5241 of the Revised Statutes, the predecessor to section 484, could not limit states' ability to enforce their own non-preempted laws against national banks.

In *St. Louis*, the national bank was acting entirely outside the powers granted by federal law and engaging in an activity prohibited by a state law. *See id.* at 659-60, 44 S.Ct. 213. At that time, the OCC had no clear authority to enforce national banks' compliance with applicable state banking laws. The Court recognized that although states generally were precluded from exercising authority over national banks, to fill a gap in the law, the state must be permitted to enforce its own law against national banks. *Id.* at 660-61, 44 S.Ct. 213. Those circumstances do not exist here.

First, residential mortgage lending is an activity expressly authorized by the federal banking laws, and a national bank's lending activity is regulated and supervised by the OCC. *See* 12 U.S.C. § 371(a). Unlike

Missouri's anti-branching law, New York's anti-discrimination law does not purport to prohibit national banks from engaging in residential mortgage lending, but rather regulates the conduct of that federally authorized banking activity. Second, in *St. Louis*, there was no federal enforcement mechanism in place; only the state possessed the authority to enforce the state's anti-branching law. In contrast, here, not only does the state's anti-discrimination law contemplate enforcement by private individuals in private enforcement actions, *see* McKinney's Exec. Law §§ 296-a, 297, but it is also enforceable by the OCC, which since 1966 has had the authority to compel national banks' compliance with any applicable law regulating the business of banking, state or federal. *See* 12 U.S.C. §§ 1818(b), (e) and (i)(2), Pub.L. 89-695, section 202, 80 Stat. 1028 (Oct. 16, 1966); *see also National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988 (3d Cir.1980).

The Attorney General asserts that references to section 5241 in the summaries of arguments provided in the syllabus in front of the actual published decision of the Supreme Court in *St. Louis* warrant the conclusion that the Supreme Court, *sub silentio*, conclusively decided that section 484's limitation on visitorial powers unambiguously excludes from its reach a state's authority to enforce its own non-preempted laws that regulate the conduct of a national bank's federally authorized banking activity. But the actual opinion of *St. Louis* did not mention nor cite section

5241 of the Revised Statutes, making the Attorney General's sweeping assertion about its importance untenable.[8]

More recent cases from the U.S. Courts of Appeals from the Third and Ninth Circuits support this Court's conclusion that *St. Louis* does not foreclose the OCC from interpreting section 484's limitation on visitorial powers to encompass state efforts to enforce non-preempted state laws that regulate the business of banking. In 1980, the U.S. Court of Appeals for the Third Circuit considered the OCC's current construction of section 484 as limiting states' ability to enforce state

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8. The OCC insists that even if *St. Louis* reached a conclusion regarding the scope of states' proper exercise of visitorial powers that differs from the OCC's current construction, it would not foreclose the OCC's new interpretation because *St. Louis* did not rest on the "unambiguous terms of the statute." *See National Cable & Telecommunications Ass'n v. Brand X Internet Services*, __ U.S. __, 125 S.Ct. 2688, 2700, 162 L.Ed.2d 820 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). Because *St. Louis* is best understood in light of the statutory framework in place at the time and involved a gap in the law that no longer exists, it does not necessarily stand in conflict with the OCC's interpretation of section 484. To the extent *St. Louis* is inconsistent with the OCC's modern interpretation of section 484, pursuant to the principle recognized in *Brand X*, the OCC is not foreclosed from reinterpreting the provision in light of changed circumstances or from clarifying its application in the different situation present here. *See Brand X*, 125 S.Ct. at 2700.

laws, even when those laws are not substantively preempted by the federal banking laws. *See National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 987-88 (3d Cir.1980).

Long held that while substantive provisions of a New Jersey anti-redlining statute were not preempted by federal banking laws, provisions of the statute requiring banks to compile and disclose statistical information and authorizing the state banking commissioner to investigate, issue subpoenas and cease and desist orders and impose penalties were preempted by section 484. *Id.* The court recognized that "when state law prohibits the practice of redlining, its enforcement so directly implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction." *Id.* at 988. The Third Circuit also observed that permitting state enforcement of the statute "would result in unnecessary and wasteful duplication of effort on the part of the bank and the state agency. From that standpoint enforcement exclusivity in the federal agency is reasonable and practical." *Id.* Accordingly, the court explained that "[q]uestions about the applicability of state legislation to national banks must be distinguished from the related inquiry of who is responsible for enforcing national bank compliance." *Id.* at 987-88.

Although the Third Circuit suggested that the question of "just what 'visitorial' powers include" remained unclear, it concluded that the OCC's interpretation that it had the exclusive power to

examine national banks' compliance with state law was "a reasonable interpretation of the National Bank Act." *Long*, 630 F.2d at 989. After *Long*, another court in this district captured this principle, noting that in the context of the dual banking system of national and state banks, "when the states seek to enact laws affecting national banks, they do so subject to the enforcement limitation imposed by Congress for the purpose of protecting against a state's use of its legislative authority to restrict, limit or otherwise penalize national banks." *First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132, 148-49 (D.Conn.1999).[9]

In August of this year, the U.S. Court of Appeals for the Ninth Circuit similarly found the distinction between "procedural" and "substantive" preemption to be a reasonable one. *See Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963-64 (9th Cir.2005) (characterizing the preemptive effect of section 484 as "entirely procedural, not substantive"). In *Wells Fargo*, the Ninth Circuit agreed with the OCC that California's banking commissioner could not exercise authority

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9. As discussed in section IV(G), *infra*, *First Union*, in *dicta*, drew a distinction between administrative and judicial enforcement concluding that states could bring judicial enforcement actions pursuant to section 484's courts of justice exception. The OCC has since reconsidered the proper application of the courts of justice exception, concluding that the distinction drawn in *First Union* contravenes the purposes of the visitorial powers provision. *See* 48 F.Supp.2d at 151; *see also* Bank Activities and Operations, 69 Fed.Reg. 1895, 1900 (Jan. 13, 2004).

granted by state law to conduct or require audits of national bank operating subsidiaries because that assertion of authority is a form of prohibited visitorial power. *Wells Fargo*, 419 F.3d at 963-64. The Ninth Circuit observed that although national banks are not governed exclusively by federal laws in their banking business, "[o]ne area of authority over national banks that has historically been the exclusive province of the federal government . . . is the 'visitorial' power." *Id.* The court explained that "[t]he exclusively federal power to 'visit' national banks is not the power to oust all state regulation of those entities. Instead, the exclusivity of visitorial authority preempts only *enforcement* of state visitation laws by *state officials*, subject to the exceptions stated in § 484(a) itself." *Id.* (emphasis in original) (citing, *inter alia*, *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 989 (3d Cir.1980)).

To counter the weight of *Long*, the Attorney General cites several cases that he contends either explicitly or implicitly recognize the right of states to enforce their non-preempted laws against national banks. Each of these cases are inapposite, however as some involve private plaintiffs who do not themselves possess any visitorial authority, *see e.g.*, *Guthrie v. Harkness*, 199 U.S. 148, 154-55, 26 S.Ct. 4, 50 L.Ed. 130 (1905); others do not implicate the authorized banking activities of national banks, either because information is sought from national banks in furtherance of investigations into other parties, *see e.g.*, *Bank of Am. Nat'l Trust & Sav. Ass'n v. Douglas*, 105 F.2d 100, 106 (D.C.Cir.1939), or because the state laws enforced were not ones

regulating the content or conduct of federally authorized banking activities. *See e.g., State of Minnesota v. Fleet Mortgage Corp.*, 158 F.Supp.2d 962, 966 (D.Minn.2001). Cases that did involve state enforcement of banking related laws did not directly address the visitorial powers provision. *See e.g., Brown v. Clarke*, 878 F.2d 627 (2d Cir.1989); *New York v. Citibank*, 537 F.Supp. 1192 (S.D.N.Y.1982).

In sum, because Congress has not specifically addressed the precise questions at issue, and because judicial precedent does not foreclose the OCC's construction of section 484, the Court must give deference to the OCC's reasonable construction of those terms. *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. As explained below, the Court finds that 12 C.F.R. § 7.4000 reflects such a reasonable interpretation.

The Attorney General raises two additional bases for declining to give deference to the OCC's construction of section 484 that the Court now addresses: first, the OCC purportedly acted outside its statutory authority in promulgating 12 C.F.R. § 7.4000 and thus is entitled to no deference; and second, because the OCC merely attempted to distill the meaning of statutory terms and judicial precedent rather than applying agency expertise, there is no basis for applying the traditional *Chevron* deference. Neither assertion provides a basis for denying the deference the OCC is due, but the Court turns now to each.

D. The OCC Acted Within Its Authority In Promulgating 12 C.F.R. § 7.4000

The Attorney General contends that the OCC acted outside its statutory authority when it promulgated 12 C.F.R. § 7.4000 because that regulation is not expressly and directly addressed to safety and soundness concerns. This cabined reading of the OCC's regulatory authority does not comport with the terms of 12 U.S.C. § 93a, which provides in relevant part, "[e]xcept to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office . . ." The Ninth Circuit recently characterized this provision as a "conferral of regulatory authority [that] is as broad as the OCC's statutory responsibilities, defined piecemeal throughout the Bank Act." *Wells Fargo*, 419 F.3d at 958 (citing provisions of the National Bank Act); *Wachovia*, 414 F.3d at 318 (sustaining OCC authority to promulgate regulations applying 12 C.F.R. § 7.4000 to national bank operating subsidiaries). As is apparent from its terms, section 93a clearly encompasses the authority to clarify ambiguous terms in section 484. 12 U.S.C. § 93a; *see also Wells Fargo*, 419 F.3d at 958.

E. Section 7.4000 Does Not Represent Merely the OCC's Attempt to Distill Statutory Terms and Judicial Precedent.

The Attorney General next contends that deference should not be afforded the OCC's regulation interpreting section 484 of the National Bank Act because the regulation represents merely the OCC's attempt at distilling statutory terms and judicial precedent. A similar argument was made in *Wachovia*, challenging the application of *Chevron* deference to 12 C.F.R. § 7.4006, the OCC's regulation clarifying that national banks' operating subsidiaries are subject to state laws to the same extent as national banks. *See Wachovia*, 414 F.3d at 319-20. The OCC had characterized section 7.4006 as clarifying that preemption of state laws as applied to operating subsidiaries "already existed based on the combination of federal statutes and preexisting regulations." *Id.* at 320 (internal citation omitted). Upon a review of the OCC's discussion of its reasons for promulgating the regulation, however, the Second Circuit was satisfied that the regulation, "at its core, reflects a policy judgment about national banks' use of operating subsidiaries," and therefore accorded it the deference it was due. *Id.* A similar analysis of the rulemaking record behind the 1999 and 2004 amendments to section 7.4000 reveals that here too, the OCC's construction of the statutory text was informed by its experience as the national banks' primary regulator.

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The OCC's discussion in the Federal Register of its reasons behind the 1999 and 2004 amendments to 12 C.F.R. § 7.4000 does include a comprehensive review of the history of the visitorial powers provision, the context in which the national banking system originated, and relevant judicial precedent. At the same time, however, the discussion indicates that the OCC's response to questions regarding the proper application of section 484 was informed by its experience acting as the sole supervisor of the banking activities of national banks in a dual banking system. *See e.g.*, Banking Activities and Operations 69 Fed.Reg. 1895, 1896 (Jan. 13, 2004) (explaining need to clarify terms in section 484 "in order to provide greater certainty to affected parties . . ." and in a manner reflecting Congressional intent to create a uniform system of regulation over national banks subject to exclusive visitorial authority except where otherwise authorized by federal law). The terms of the statute engendered sufficient ambiguity that the OCC felt the need to clarify their application, and particularly in the context of states' use of the courts of justice exception as a means of exercising otherwise prohibited visitorial powers. *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed.Reg. 6363, 6367 (Feb. 7, 2003). In setting forth its proposed amendments, the OCC described the history and purpose of the National Bank Act as well as relevant judicial precedent in order to "present the [ ] proposed changes in context." *Id.* The OCC's "interpretation and extrapolation" of the scope of the visitorial powers provision and its exceptions "is precisely the type of

interpretation with which an administrative agency is charged." *Wachovia Bank, N.A. v. Burke,* 319 F.Supp.2d 275, 282 (D.Conn.2004) *aff'd in part and vacated on other grounds,* 414 F.3d 305 (2d Cir.2005). Under *Chevron,* its reasonable application of that expertise and experience is entitled to deference.

F. Section 7.4000 Reflects a Permissible Construction of the Statute

Where, as here, Congress has not addressed the precise questions at issue, and has delegated authority to the OCC to fill in gaps in the National Bank Act, the Court must determine, pursuant to step two of *Chevron,* whether the OCC's regulation "harmonizes with the language, origins, and purpose of the statute." *Coke v. Long Island Care at Home, Ltd.,* 376 F.3d 118, 128 (2d Cir.2004). If the regulation reflects a permissible construction of the statute that is not contravened by its text or Congressional intent, it must be given " 'controlling weight.' " *NationsBank,* 513 U.S. at 257, 115 S.Ct. 810; *see also Wachovia,* 414 F.3d at 321.

The OCC's regulation implementing section 484 was first codified as 12 C.F.R. § 7.6025 in 1971, and has been revised a number of times and renumbered to its current codification at 12 C.F.R. § 7.4000. *See* 36 Fed.Reg. 17000, 17013 (Aug. 26, 1971) (adopting 12 C.F.R. § 7.6025(b)).[10]

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10. *See also* 60 Fed.Reg. 11924 (Mar. 3, 1995) (notice of proposed rule); 61 Fed.Reg. 4849, 4869 (Feb. 9, 1996) (final rule); 64 Fed.Reg. 31749 (June 14, 1999) (notice of proposed rule); 64 (Cont'd)

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In recent amendments promulgated in 1999 and 2004, the OCC has extrapolated on the proper understanding of "visitorial powers" and the courts of justice exception.

In 1999, the OCC proposed amendments to section 7.4000 in order "to clarify the extent of the OCC's visitorial powers under 12 U.S.C. § 484 . . ." *See* Investment Securities; Rules, Policies, and Procedures for Corporate Activities; and Interpretive Rulings, 64 Fed.Reg. 31749, 31751 (June 14, 1999). The 1999 amendments codified the definition of "visitorial powers" and illustrated the meaning of the term by including a "non-exclusive list" of the OCC's visitorial powers, including: "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii)[r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." *See* 12 C.F.R. § 7.4000(a)(2)(i)-(iv) (as amended in 1999); Investment Securities; Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations, 64 Fed.Reg. 60092, 60099, 60100 (Nov. 4, 1999) (announcing final rule).

In its February 7, 2003 Notice of Proposed Rulemaking, the OCC acknowledged that questions had

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Fed.Reg. 60092, 60099 (Nov. 4, 1999) (final rule); 68 Fed.Reg. 6363 (Feb. 7, 2003) (notice of proposed rule); 69 Fed.Reg. 1895, 1904 (Jan. 13, 2004) (final rule).

arisen regarding the scope of the OCC's visitorial authority over national banks, specifically questions regarding "what activities conducted by a national bank are subject to the OCC's exclusive visitorial powers" and the meaning of the "vested in the courts of justice exception." *See* Rules, Policies, and Procedures for Corporate Activities; Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed.Reg. 6363, 6367 (Feb. 7, 2003). The OCC again proposed revisions to clarify the scope of its exclusive visitorial powers and in its final rule issued in 2004 clarified that, "[u]nless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(a)(3) (as amended in 2004); *see also* Bank Activities and Operations, 69 Fed.Reg. 1895, 1904 (Jan. 13, 2004) (announcing final rule). The 2004 amendments also clarified that the courts of justice exception does not permit state officials to exercise otherwise prohibited visitorial powers through the courts. 12 C.F.R. § 7.4000(b)(2) (as amended in 2004); *see also* 69 Fed.Reg. at 1904.

The Court first turns to the OCC's construction of the scope of the visitorial powers limitation: whether the OCC reasonably concluded that section 484 bars states from enforcing non-preempted state laws that regulate the content and conduct of federally authorized banking activities. Second, the Court addresses whether the OCC's construction of the courts of justice exception is permissible.

Appendix B

1. The OCC's Interpretation of "Visitation" is Consistent with the Historical Understanding of that Term

The Supreme Court provided an early explication of the term "visitation" in *Guthrie v. Harkness*, 199 U.S. 148, 156-57, 26 S.Ct. 4, 50 L.Ed. 130 (1905), in which the Court found a private shareholder's action demanding access to a national banks' books and records was not barred by the National Bank Act's visitorial powers provision, then codified at section 5241 of the Revised Statutes. The Court reviewed definitions of the term "visitation," noting that visitation refers to "the act of examining into the affairs of a corporation," and that "[v]isitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings." *Id.* at 157-58, 26 S.Ct. 4 (internal quotations and citations omitted). At common law, visitation was understood as a right "exercised by the King as to civil corporations, and as to eleemosynary ones, by the founder or donor." *Id.* at 158, 26 S.Ct. 4. Correspondingly, "[i]n the United States, the legislature is the visitor of all corporations founded by it for public purposes" *Id.; see also Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 673-76, 4 L.Ed. 629 (1819) (Story, J., concurring) (explaining visitation at common law).

"Visitation, in law," was defined in *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740 (1881), *appeal dismissed*, 106 U.S. 523, 1 S.Ct. 489, 27 L.Ed.

268 (1883), as "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations . . . . [meaning] 'inspection; superintendence; direction; regulation.' " *See* 6 F. at 740-41 (cited in *Guthrie*, 199 U.S. at 158, 26 S.Ct. 4); *see also Peoples Bank v. Williams*, 449 F.Supp. 254, 259 (W.D.Va.1978).

Guthrie and *Hughes* highlight two important distinctions in understanding the nature of visitorial power. In *Guthrie*, the Supreme Court explained that visitation did not include the private right of one of the bank's shareholders to examine the business affairs of the bank as a shareholder; but rather is "a *public right, existing in the state* for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers." *Guthrie*, 199 U.S. at 158-59, 26 S.Ct. 4. In *Hughes*, a county auditor sought information from a national bank regarding its depositors in the course of his investigation into the depositors' personal tax liabilities. *See Hughes*, 6 F. at 738-39. The court concluded that the auditor's investigation did not constitute visitation for purposes of section 5241 because the auditor did not seek to investigate or supervise *the bank*, but rather sought information from the bank in furtherance of his investigation of individuals' tax liabilities. *See id.* at 740-41.

Each of these distinctions is reflected in the OCC's construction of section 484's limitation on states' visitorial powers. The OCC's regulation bars states, not

private parties, from enforcing laws against national banks, and it bars states from enforcing only those laws regulating the content and conduct of federally authorized banking activities against national banks. *See* 12 C.F.R. § 7.4000.

Guthrie also recognized that in providing in section 5241 that national banks would be free from the exercise of visitorial powers except as specifically provided otherwise,

> Congress had in mind . . . that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power.

Id. at 159, 26 S.Ct. 4. Consistent with this historical understanding of the nature of visitation, the OCC reasonably defines section 484's limitation on visitorial powers in a manner that encompasses any attempt by states to supervise national banks' compliance with laws governing the conduct of federally authorized banking activities, whether directly or through the courts.

2. Section 7.4000 Interprets Visitorial Powers in a Manner Consistent With the Purposes Animating the Enactment of the National Bank Act

The Act of June 3, 1864 provided for the organization of a system of national banking associations, subject to the supervisory authority of the Comptroller of the Currency, and established a uniform and secure national currency that could help stabilize and support the post-Civil War national economy. *See* Act of June 3, 1864, ch. 106 §§ 1, 54, 13 Stat. 99, 99, 116; *see also Tiffany v. Nat'l Bank of the State of Missouri*, 85 U.S. (18 Wall.) 409, 413, 21 L.Ed. 862 (1873).

The creation of this national banking system had followed a period during which state chartered banks proliferated, each issuing its own currency and operating in the absence of any federal regulation; in the wake of the Civil War, Congress recognized the urgent need for a uniform currency, and it was in this context that Congress enacted the National Currency Act of 1863, which designated the Comptroller of the Currency as the single authority responsible for approving federal charters and regulating all matters relating to the new national currency. *See* Act of Feb. 25, 1863, ch. 58, § 1, 12 Stat. 665, 665; *see also* Cong. Globe, 37th Cong., 3rd Sess. 844 (Feb. 10, 1863) (remarks of Sen. Sherman). The following year, Congress passed the Act of June 3, 1864-the National Bank Act-repealing and replacing the National Currency Act. *See* Act of June 3, 1864, ch. 106, § 62, 13 Stat. 99. The Act of 1864 included provisions

comprehensively regulating the new national banking associations, providing for reserve requirements; placing limitations on interest rates; and providing for regular examinations by the OCC. *See e.g.*, Act of June 3, 1864, ch. 106, §§ 30, 31, 44, 54, 13 Stat. at 108, 112-13, 116.

Essential to the effort of creating a uniform national currency, was creating a system of national banks that would operate according to federal law and supervision, and without the intrusion of potentially unfriendly state regulation. *See Easton v. Iowa*, 188 U.S. 220, 229-230, 23 S.Ct. 288, 47 L.Ed. 452 (1903); *see also* Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (remarks of Sen. Sumner) (recounting the constitutional principles announced in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), and insisting that the new national banking system "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its function"). Although Congress did not entirely preempt state regulation of banking, it limited the exercise of visitorial powers over national banks to those it vested in the OCC, and those vested in the courts. *See* Act of June 3, 1864, ch. 106, § 54, 13 Stat. at 116 (codified at 12 U.S.C. § 484).

The OCC drew on this history in its recent clarification of the scope of visitorial powers and the exceptions to its exclusive visitorial authority created by Congress. *See* 69 Fed.Reg. 1895, at 1898. The OCC has read section 484's limitation on visitorial powers in

light of the basic objectives of the National Bank Act: to create a uniform system of national banks, comprehensively and exclusively regulated by federal law. The available legislative history does not contravene the OCC's conclusion that even as states are free to enact legislation substantively governing national banks' banking activity, the enforcement of those laws is properly vested in the OCC, not in state officials. *See Coke*, 376 F.3d at 127.

This view of the scope of the OCC's exclusive visitorial authority also finds support in a more recently enacted federal banking law, the Riegle Neal Interstate Banking and Branch Efficiency Act of 1994 (the "Riegle Neal Act").

The Riegle-Neal Act, 12 U.S.C. §§ 36, *et seq.*, amended federal banking laws to permit interstate branches by national banks. Congress provided that those branches would be subject to "[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches" to the same extent as such state laws apply to state branch banks, except where preempted by federal law or where state laws discriminate against national banks' branches. 12 U.S.C. §§ 36(f)(1)(A), (A)(i), and (A)(ii). At the same time, however, Congress made clear that "[t]hc provisions of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B).

The OCC views this grant of authority to itself rather than to relevant state officials as evidence that its construction of section 484 is in line with Congressional intent to retain exclusive supervisory authority in the OCC even as states are permitted to enact laws substantively regulating banking activities. The Attorney General responds by citing legislative history reflecting Congressional intent that the Riegle-Neal Act not be read as altering the balance of federal and state power over national banks' branching activity.[11] But broadly worded concerns about the balance of federal and state power do not defeat the clear import of 12 U.S.C. § 36(f)(1)(B), which vests in the OCC—not the host states—the power to enforce the applicable

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11. *See* H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 ("States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses, and communities. Federal banking agencies . . . play an important role in maintaining the balance of Federal and State law under the dual banking system. Congress does not intend that the Interstate Banking and Branching Efficiency Act of 1994 alter this balance and thereby weaken States' authority to protect the interests of their consumers, businesses, or communities."). Congress addressed the substantive preemption issue in a separate provision, specifically stating that the standards for preemption of a state law were not altered by the Act. *See* 12 U.S.C. § 36(f)(3). The Act also includes a provision requiring the OCC to report to Congress annually regarding its actions taken in regard to the applicability of state laws. *See* 12 U.S.C. § 36(f)(1)(C).

state laws. By dealing separately with the applicability of state law and the authority to enforce that law, Congress did not alter the balance of state authority over national banks, but rather applied to national banks' interstate branches the same limitations on state visitorial powers as are applicable to national banks themselves. Thus, this Court agrees with the conclusion of the district court in *First Union* that "[t]he OCC's view of its exclusive administrative enforcement authority for all banking laws, state and federal is consistent with 12 U.S.C. § 36(f)." *First Union*, 48 F.Supp.2d at 146.

3. National Fair Lending Policy as Expressed in the Fair Housing Act Does Not Require a Narrower Interpretation of the OCC's Exclusive Visitorial Powers

The Attorney General contends that section 484 must be construed in *para materia* with the federal Fair Housing Act (the "FHA") so as not to undermine Congress' intent to advance the national policy of fair lending by permitting multiple layers of enforcement at federal, state and local levels. It is true that the meaning of terms in a broadly worded statute may be narrowed by subsequent acts of Congress "where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *See Brown & Williamson*, 529 U.S. at 143, 120 S.Ct. 1291; *see also Cal. Pub. Employees Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 100 (2d Cir.2004), *cert. denied*, 543 U.S. 1080, 125 S.Ct. 862, 160 L.Ed.2d 824 (2005). In fact, both

parties invoke that principle here. A consideration of the several enforcement provisions in the FHA, however, supports the OCC's argument that Congress did not intend to impliedly alter the application of section 484 in the fair lending context.

While the FHA specifically prohibits discrimination in lending, the Act is not limited to lending practices; rather, it much more broadly aims at eliminating discrimination in housing. *See* 42 U.S.C. §§ 3601, 3604-3606. As elucidated in the *amicus curiae* brief of the American Bankers Association, *et al.*, there is no indication that Congress either expressly or implicitly intended the FHA's several enforcement mechanisms to override the National Bank Act's specific limitation on the exercise of visitorial powers over national banks. In fact, while the FHA specifically directs the various federal banking regulators, including the OCC, to cooperate with the Secretary of Housing and Urban Development and the United States Attorney General to enforce its provisions, *see* 42 U.S.C. § 3608(d), none of the various enforcement provisions expressly grants state Attorneys General the power to enforce the law. *See* 42 U.S.C. §§ 3610, 3613 and 3614. Because Congress explicitly addressed the applicability of the FHA to federal banking institutions but did not expressly create an exception to section 484's limitations for state Attorneys General, the Court will not presume that Congress intended to implicitly modify the longstanding limitation on the exercise of visitorial authority over national banks.

In sum, the OCC's construction of section 484 as limiting states' authority to enforce state laws regulating the content or conduct of federally authorized banking activities even where those state laws are not substantively preempted, is a reasonable and permissible construction of the statute and is therefore entitled to deference. *See Chevron*, 467 U.S. at 844, 104 S.Ct. 2778.

G. The OCC's Interpretation of the Courts of Justice Exception Is Also a Permissible Construction of the Statute

The Attorney General also contends that even if his threatened actions are deemed "visitorial," he nevertheless has authority to enforce the state's anti-discrimination law in state or federal court pursuant to the National Bank Act's express exception permitting the exercise of those visitorial powers vested in courts of justice. Such a reading of the courts of justice exception, however, is plainly at odds with the OCC's interpretation reflected in 12 C.F.R. § 7.4000(b), and an analysis of the statutory scheme demonstrates that the OCC's interpretation is reasonable and must be afforded deference.

Appendix B

1. The OCC Reasonably Reconsidered Its Earlier Position Reflected in *First Union National Bank v. Burke*

The OCC acknowledges that its current interpretation of the courts of justice exception is inconsistent with the position it acquiesced to in *First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132, 135 (D.Conn.1999). *First Union* involved the OCC's motion for preliminary injunctive relief enjoining a state banking official from administratively enforcing a state law limiting banks' collection of ATM fees. Although the banks involved in the case separately sought a determination that the state law did not bar their activities, for the purposes of the OCC's motion, the court assumed that the law applied and proceeded with the question of whether the OCC was likely to prevail on the merits of its claim that section 484 and its implementing regulation precluded the state banking commissioner from proceeding with pending enforcement actions. *See id.* at 135-36. The district court, concluding that the OCC was likely to prevail, issued a preliminary injunction enjoining the state banking commissioner from issuing cease and desist orders. *Id.* at 151. Although no judicial action had been brought or apparently threatened, the court noted that its injunction would not bar the state commissioner from enforcing the statute through the courts. *See id.*[12]

12. Other district courts have since rejected the distinction drawn by *First Union*. *See Bank One Delaware, N.A. v. Wilens*, No. SACV 03-274, 2003 WL 21703629, at *2 (C.D.Cal. July 7, (Cont'd)

Appendix B

The Attorney General asserts that *First Union* is not an aberration, but is consistent with a long history of states enforcing their consumer protection laws against national banks and that the OCC's current interpretation represents a sharp departure from its own long-standing interpretation of the courts of justice exception. (*See* Brief Amicus Curiae of State Attorneys General, at 14, n.8 (collecting cases)). The OCC responds that its amendment, adopted in the wake of *First Union*, was justified because "[t]he allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with [the] need to protect national banks from state interference." *See* 69 Fed.Reg. 1895-1900.

To the extent that the OCC's most recent amendment to section 7.4000 marks a departure from its prior interpretation of the courts of justice exception, "the change is not invalidating," if the OCC sufficiently

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(Cont'd)

2003) (enjoining "private attorney general" action where private party asserted the rights of the general public in action against national bank, concluding that the "courts of justice" exception would not permit judicial enforcement where administrative action could not otherwise be taken); *see also Goleta Nat'l Bank v. O'Donnell*, 239 F.Supp.2d 745, 757 (S.D.Ohio 2002) (characterizing a national bank's attempt to distinguish between judicial proceedings and administrative action for purposes of section 484 and 12 C.F.R. § 7.4000 as an argument that "borders on being frivolous," because the statute and regulation "prohibit regulation by state officials regardless of the form of the enforcement action").

justifies the reasonableness of its current interpretation. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, __ U.S. __, 125 S.Ct. 2688, 2699-2700, 162 L.Ed.2d 820 (2005) ("[I]f the agency adequately explains the reasons for a reversal of policy, 'change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency' ") (quoting *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996)). The question for this Court, therefore, is whether the OCC's current construction of the courts of justice exception as found in section 7.4000 is reasonable.

2. The OCC's Interpretation of the Courts of Justice Exception is Consistent with the Statutory Text and the Purpose Underlying the National Bank Act

The OCC reasons that the courts of justice exception is best understood as permitting courts to exercise visitation over national banks in actions-like the one at issue in *Guthrie*-that do not otherwise constitute an attempt to exercise prohibited visitorial authority. The OCC explained in the preamble to the 2004 amendments to 12 C.F.R. § 7.4000: "[b]ecause in 1864, the primary procedure for the exercise of visitorial powers was through an action in court, it would have made little sense for Congress to have created an exception that was nearly coterminous with the prohibitory rule." *See* 69 Fed.Reg. at 1899-1900. In *Guthrie*, the Supreme Court recognized that "[t]he visitation of civil

corporations is by the government itself, through the medium of the courts of justice." *See Guthrie,* 199 U.S. at 157, 26 S.Ct. 4. It also recognized that the exercise of judicial power itself is a form of visitation, and that power is what Congress excepted from the general limitation of visitation over national banks. *See id.* at 158-59, 26 S.Ct. 36.

Guthrie does not stand for the proposition that the courts of justice exception must be read to permit states to use judicial remedies to enforce applicable state laws. The *Guthrie* court noted that the predecessor to section 484 did not intend to extinguish the right of a shareholder to bring an action to compel access to a bank's books and records, explaining,

> If the right to compel the inspection of books was a well-recognized common law remedy, as we have no doubt it was, even if included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute.

Guthrie, 199 U.S. at 158-59, 26 S.Ct. 4. The Supreme Court was simply acknowledging that the exercise of judicial power to compel production of books is itself an act of visitation, properly exercised in actions by private individuals. *Guthrie* does not, however, support the very different proposition that a state—prohibited from exercising its own visitorial powers directly against a bank—may use the courts as a medium for doing so.

Guthrie noted the distinction between private actions and the assertion of a superior, sovereign authority to enforce compliance with applicable laws. *Id.* The OCC's most recent amendment to section 7.4000 draws this same distinction, and is therefore reasonable.

Moreover, as the OCC points out, the Attorney General's broad interpretation of the courts of justice exception is in contrast to the other exceptions in section 484(a) and 484(b), each of which is narrowly drawn. *See* 12 U.S.C. §§ 484(a) and (b). Section 484(a) carves out the additional exception for powers "such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized," 12 U.S.C. § 484(a), while section 484(b) permits "lawfully authorized State auditors and examiners" to "at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws." 12 U.S.C. § 484(b). The OCC's clarification of the courts of justice exception is consistent with these other exceptions in reflecting a narrowly drawn exception to the otherwise broad preclusion of states' visitorial authority.

The OCC's interpretation of the courts of justice exception, "preserves the powers that are inherent in the courts" and gives effect to Congressional intent to preclude state authorities from exercising visitorial authority over national banks. *See* 69 Fed.Reg. at 1900.

The OCC has reasonably concluded that the exception should not be read in a manner that would swallow the rule against state visitation by permitting state officials to circumvent the limits on their visitorial powers by invoking the power of the courts. The OCC's regulation thus reflects a permissible construction of the statute, and accordingly is entitled to deference. *See NationsBank*, 513 U.S. at 262, 115 S.Ct. 810; *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. With respect to policy concerns raised by the Attorney General, "[t]he states' proper recourse at this point is to Congress. [The Court] must defer to the OCC's authorized and reasonable implementation of the NBA." *Wachovia*, 414 F.3d at 321.

V. The Attorney General's Administrative Procedure Act Counterclaim

The Attorney General's counterclaim seeking an order setting aside 12 C.F.R. § 7.4000 pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C), fails for the reasons set forth above.

Pursuant to section 706 of the Administrative Procedure Act, a district court may "hold unlawful and set aside agency action," where that action is found to be, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) and (C). In support of his counterclaim, the Attorney General reasserts the arguments already raised to prove the OCC's interpretation to be contrary to law, outside the

OCC's statutory jurisdiction and authority, and an unreasonable construction of section 484. For the reasons detailed above, these arguments are unavailing.

The Attorney General also fails to show the OCC's regulation to be arbitrary and capricious. "[T]he scope of judicial review under this standard is narrow and deferential." *Henley v. Food and Drug Admin.*, 77 F.3d 616, 620 (2d Cir.1996). So long as the reviewing court is certain "that an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made," the judgment of the agency must be affirmed. *Id.* The OCC solicited comments and responded to concerns—including many of those asserted here—and reached a reasonable conclusion regarding the proper construction of section 484's limitation on visitorial powers and the courts of justice exception. *See* 69 Fed.Reg. at 1896. "Where, as here, an agency's determination cannot be characterized as arbitrary, capricious, an abuse of discretion, or contrary to law, the [Administrative Procedure Act] precludes [this Court] from substituting [its] judgment for that of the agency." *Henley*, 77 F.3d at 621. Because the OCC acted within its jurisdiction and statutory authority in promulgating 12 C.F.R. § 7.4000, and because section 7.4000 reflects a reasoned approach to preempting state enforcement of banking related laws and is not in conflict with the statute or relevant judicial precedent, the Attorney General's counterclaim fails.

VI. Conclusion

Because 12 C.F.R § 7.4000 is a reasonable interpretation of the National Bank Act, and because the Attorney General's investigation into national banks' residential mortgage lending activities is prohibited by that regulation, the OCC is entitled to a declaratory judgment that: (1) the Attorney General of the State of New York cannot enforce state fair lending laws against national banks or their operating subsidiaries; (2) the Attorney General cannot compel compliance with a state investigation into potential violations in connection with the residential mortgage lending practices of those banks except as authorized by federal law; and (3) the courts of justice exception to section 484 does not provide an exception permitting the Attorney General to enforce state or federal fair lending laws through judicial actions.

Because the Attorney General's assertion of visitorial authority impermissibly interferes with the OCC's exclusive supervisory role, the OCC's application for injunctive relief pursuant to Fed.R.Civ.P. 65 is granted. The Attorney General for the State of New York, and all those acting under his direction or in concert with him, are permanently enjoined from issuing subpoenas or demanding inspection of the books and records of any national banks in connection with

his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Dated: New York, New York
October 12, 2005

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED OCTOBER 12, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.

Plaintiff,

-against-

ELIOT SPITZER, in his official capacity as Attorney General for the State of New York,

Defendant.

OPINION AND ORDER

SIDNEY H. STEIN, U.S. District Judge.

The Clearing House Association, L.L.C., (the "Clearing House"), brings this action against Eliot Spitzer, the Attorney General of the State of New York to enjoin him from instituting enforcement actions or investigating the Clearing House's national bank members and their operating subsidiaries relating to their residential mortgage lending practices. The Clearing House contends that the Attorney General's investigation and threatened enforcement

actions impinge on the exclusive visitorial powers of the Office of the Comptroller of the Currency (the "OCC") in violation of section 484(a) of the National Bank Act, 12 U.S.C. § 484(a), and the OCC's regulation interpreting that provision, codified at 12 C.F.R. § 7.4000.

The bulk of the issues raised by the Clearing House's application for injunctive relief have been resolved in the opinion issued today in the related action of *The Office of the Comptroller of the Currency v. Spitzer*, No. 05 Civ. 5636, (*"OCC v. Spitzer"*). In *OCC v. Spitzer*, this Court, applying the framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), concluded that 12 C.F.R. § 7.4000 reflects a reasonable and permissible construction of the National Bank Act. (*See* Opinion and Order in *OCC v. Spitzer*, dated October 12, 2005). Because the Attorney General's assertion of authority pursuant to state law to investigate and bring enforcement actions related to the residential lending practices of national banks impermissibly infringes on the OCC's exclusive visitorial authority as defined in 12 C.F.R. § 7.4000, this Court granted the OCC's application for declaratory and permanent injunctive relief against the Attorney General.

In this action, the Clearing House seeks an additional measure of relief based on the Attorney General's assertion that 42 U.S.C. § 3613(a), the civil enforcement provision of the federal Fair Housing Act,

(the "FHA"), authorizes the Attorney General to sue national banks in the state's *parens patriae* capacity for alleged violations of the FHA's fair lending provisions. Because an action in the state's *parens patriae* capacity to enforce the FHA's fair lending provisions against the Clearing House national bank members constitutes a form of visitorial authority prohibited by section 484(a) of the National Bank Act, and is not expressly authorized by the FHA, the Clearing House is entitled to the injunction it seeks.

I. Background

The Court assumes familiarity with its opinion issued today in *OCC v. Spitzer*, No. 05 Civ. 5636(SHS), and limits the discussion here to issues not raised directly in *OCC v. Spitzer*. Indeed, this opinion need be read in conjunction with that one. The Court writes separately to address issues regarding the Clearing House's ability to bring its claim in federal court, and to answer the question raised only by the Clearing House of whether the Attorney General should be enjoined from bringing an action in the state's *parens patriae* capacity to enforce the federal Fair Housing Act against national banks.

The Clearing House commenced this action on June 16, 2005 seeking to enjoin the Attorney General from issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination in lending laws against the national banks that are members of the Clearing House, with respect

to their mortgage lending operations. *OCC v. Spitzer* was accepted as a related case, and pursuant to Fed.R.Civ.P. 65(a)(2), the trials on the merits in this action and *OCC v. Spitzer* were consolidated, with the hearings on the preliminary injunction applications. (Order, dated July 5, 2005). The trial in both actions was held on September 7, 2005, and at that time, argument was heard and affidavits and other exhibits were admitted into evidence. (Transcript, dated Sept. 7, 2005, at 36-37).

The Clearing House Association, L.L.C., is an association of commercial banks, including federally chartered national banks. (*See* Declaration of Norman R. Nelson, Esq., dated June 15, 2005 at ¶¶ 1-3). The Clearing House describes itself as dedicated to protecting the rights and interests of its member banks as well as advancing the broader interests of the domestic commercial banking industry. (*Id.* at ¶¶ 2, 4). The Clearing House states that it is "interested in ensuring stability and certainty in the regulatory environment in which its member banks operate." (*Id.* at ¶ 4). At least four of the Clearing House's national bank members or their operating subsidiaries—Citibank, N.A., Wells Fargo Bank, N.A., HSBC Bank U.S.A., N.A., and JPMorgan Chase Bank, N.A.—are subjects of the inquiry initiated by the Attorney General and have received requests for certain non-public lending information. (*See* Nelson Decl. at ¶¶ 7-8; Declaration of Dennis D. Parker in Supp. of Def.'s Opp to Pls.' Request for Injunctive and Declaratory Relief and in Supp. of Counterclaim, dated August 5, 2005, ("Parker Decl."), at ¶ 4-5, and Ex. 2).

Appendix C

As recounted in the related action, a preliminary analysis by the Attorney General of home loan pricing data made publicly available pursuant to the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810, led the Attorney General to conclude that the data established a *prima facie* case of race discrimination in violation of federal and state fair lending laws. (*See* Parker Decl., at ¶¶ 4-5). In letters to HSBC, Wells Fargo and JP Morgan Chase, the Attorney General informed the banks that he had commenced a preliminary inquiry into each bank's lending practices, and requested that "[i]n lieu of issuing a formal subpoena . . ." the banks "voluntarily provide" certain non-public lending information. (*See* Letters from Dennis D. Parker, dated April 19, 2005, Ex 2 to Parker Decl.).

In his opposition to the Clearing House's application for injunctive relief, the Attorney General asserted that the FHA creates a federally authorized exception to section 484's general limitation on states' visitorial powers. *See* 12 U.S.C. § 484(a) (limiting the exercise of visitorial powers, "except as authorized by Federal law . . ."). Specifically, the Attorney General contends that the FHA's private right of action provision, 42 U.S.C. § 3613(a)—which authorizes suits by an "aggrieved person"—permits the state to sue national banks both in its *parens patriae* capacity, and on its own behalf, claiming injury to its proprietary interests.

Because the injunction issued in *OCC v. Spitzer* applies by its terms to all national banks and their operating subsidiaries, it clearly encompasses the

national-bank members of the Clearing House on whose behalf the Clearing House seeks injunctive relief. The single outstanding issue on the merits of the Clearing House's application is whether the Attorney General's threatened action *pursuant to the Fair Housing Act,* is also prohibited by section 484's limitation on states' visitorial authority, or whether such an action would fall within an exception "authorized by Federal law."

Because the Attorney General has challenged the Clearing House's ability to bring this claim in federal court, the Court turns first to the questions of whether federal subject matter jurisdiction exists, and whether the Clearing House has standing to bring this action, and answers each question in the affirmative.

II. Subject Matter Jurisdiction

The Clearing House contends that subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 because this action arises under the National Bank Act, 12 U.S.C. §§ 21, *et seq.*, asserting that "[i]t is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Fleet Bank, Nat. Ass'n v. Burke,* 160 F.3d 883, 888 (2d Cir.1998) (citing *Ex parte Young,* 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

The Attorney General responds by claiming that the Clearing House's complaint is one that merely anticipates a federal defense that would be filed in answer to a potential state court action brought by the

Attorney General, and thus lacks federal jurisdiction under what is known as the "well-pleaded complaint" rule. *See Fleet Bank*, 160 F.3d at 886. However, the U.S. Supreme Court has long made it clear that actions such as this one that seek to enjoin state officials from interfering with federal rights present a federal question over which federal courts have jurisdiction. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, n. 14, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908)); *see also Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002). The rule was stated most plainly in *Shaw* as follows:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96 n. 14, 103 S.Ct. 2890 (internal citations omitted); *see also Verizon*, 535 U.S. at 642, 122 S.Ct. 1753 (there is "no doubt that federal courts have jurisdiction under § 1331" over an action seeking declaratory and injunctive relief against state officials

on the grounds that a state regulation was preempted by federal law).

While it is true that the Clearing House's claims might be raised as defenses in a claim brought in a state court action by the state Attorney General, "a properly framed federal cause of action does not fall outside § 1331 simply because it could *also* arise as an affirmative federal defense in state court." *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 61 (1st Cir.2005) (emphasis in original). In any event, the sole issue that remains to be resolved in this action is the Clearing House's request for injunctive relief enjoining the Attorney General from bringing an action pursuant to the *federal* Fair Housing Act, thus even looking to the character of the anticipated claim to determine whether it would present a federal question, the well-pleaded complaint rule is satisfied. *See Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 248, 73 S.Ct. 236, 97 L.Ed. 291 (1952) ("Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court."); *see also Fleet Bank*, 160 F.3d at 886. Because the Clearing House seeks injunctive relief from the Attorney General's threatened enforcement action on the ground that such action is prohibited by federal law, it has presented a federal question over which this Court has jurisdiction pursuant to 28 U.S.C. § 1331 to resolve.

Appendix C

III. Standing

The Clearing House asserts that it has standing to bring this action on behalf of its members pursuant to a judicially created concept known as associational standing. The applicable test for associational standing is set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977). *See N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 325 (2d Cir.2003). As explicated in *Hunt*,

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 97 S.Ct. 2434. To meet the first prong of this test, the Clearing House must establish that its members satisfy the three elements comprising the "irreducible constitutional minimum of standing" required by Article III of the U.S. Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also N.Y. Pub. Interest Research Group*, 321 F.3d at 325. First, the member banks "must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not

conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130.

As described above, four Clearing House member banks have been threatened with the state's assertion of authority to sue to compel the national banks' compliance with laws governing their federally authorized banking activities. "When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be . . . proved . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-562, 112 S.Ct. 2130. The member banks are the direct targets of the Attorney General's threatened enforcement actions, and an injunction would protect those banks from the allegedly unlawful intrusion into their federally authorized banking operations.

The threat of litigation in this case is not merely conjectural or hypothetical. *See O'Shea v. Littleton*, 414 U.S. 488, 496-97, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The Attorney General has informed specific member banks as well as this Court that the mortgage pricing data from four Clearing House member banks was, he

believes, "sufficient to establish a *prima facie* case of discrimination on the basis of race under both federal and state fair lending laws." (Parker Decl. at ¶¶ 4-5; Letters from Dennis Parker, dated April 19, 2005, Ex. 2 to Parker Decl.). At the trial of this action, the Attorney General's attorney stated that the Attorney General intended to proceed with the investigation and enforcement actions in the absence of an injunction. (Transcript, dated Sept. 7, 2005, at 38). Accordingly, the Clearing House has established that its members would have standing to sue in their own right, thus meeting the first prong of the *Hunt* test.

The Clearing House also meets the second and third prongs of the *Hunt* test. The interests the Clearing House seeks to protect, particularly its members' interest in being free from the burden of complying with state regulatory and enforcement efforts allegedly taken in violation of section 484 of the National Bank Act, and its members' interest in certainty in their regulatory environment, are the type of interests that are "germane to the [Clearing House's] purpose." *Hunt*, 432 U.S. at 343, 97 S.Ct. 2434; (*See* Nelson Decl. at ¶¶ 3-4). Finally, the participation of the individual members is not required either to establish the fact or extent of the threatened injury; the Attorney General's assertion that the available data establishes a *prima facie* case of prohibited discrimination was asserted without distinction between the national banks that are the focus of his inquiry. (*See* Parker Decl. at ¶¶ 4-5). The Clearing House seeks only injunctive relief that " 'will inure to the benefit of those members of the association

actually injured.' " *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir.2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 515, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)); *see also International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 287-88, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986).

Accordingly, the Clearing House meets the test the Supreme Court set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) for associational standing; it therefore has standing to bring this action as a representative of its member banks.

VI. Discussion

The Clearing House contends that section 484(a) of the National Bank Act, 12 U.S.C. § 484(a), as clarified by 12 C.F.R. § 7.4000, bars the Attorney General from bringing an action pursuant to the Fair Housing Act in which he would assert standing in the state's *parens patriae* capacity. Section 484(a) provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress . . .

12 U.S.C. § 484(a). Here, the Attorney General asserts that he is "authorized by Federal law," specifically by

the civil enforcement provision of the Fair Housing Act, 42 U.S.C. § 3613(a)(1)(A), to bring an action to enforce that Act's fair lending provisions against national banks in the state's *parens patriae* capacity.[1]

The question that this Court must answer therefore, is whether a *parens patriae* action constitutes visitation for purposes of 12 U.S.C. § 484(a), and if so, whether Congress intended to create an exception to the limitation on state visitorial power by permitting states to bring *parens patriae* actions to enforce the FHA's fair lending provisions against national banks. *See Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 259, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *see also Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 120-21 (2d Cir.2002). In answering that question, the Court first outlines briefly the nature of *parens patriae* actions and considers whether they constitute a form of visitation for purposes of the National Bank Act. The Court then considers whether the FHA, viewed in light of the National Bank Act's prohibition on state visitorial authority, evinces a Congressional intent to permit states to bring *parens*

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1. The Attorney General briefly asserts that he has the authority to bring an action claiming injury to the state's proprietary interests as well as in the state's *parens patriae* capacity. However, not only does such a claim raise constitutional standing issues, but plaintiff here seeks only an injunction addressed to a *parens patriae* suit. Rather than analyze a conjectural claim asserting potential proprietary interests, this Court will address solely the question of whether an injunction is appropriate to bar a *parens patriae* litigation.

patriae actions to enforce the FHA's fair lending provisions against national banks.

A. A *Parens patriae* Action Is a Form of Visitation

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 600, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982), the Supreme Court explained the history of the *parens patriae* doctrine pursuant to which a state may bring suit on behalf of its citizens asserting injury to a "quasi-sovereign interest," which is a "judicial construct that does not lend itself to a simple or exact definition." *Id.* at 601, 102 S.Ct. 3260. As set forth in *Snapp*, the *parens patriae* doctrine, which has its roots in the principle that a sovereign, as "parent of the country," may step in on behalf of its citizens to prevent "injury to those who cannot protect themselves," has developed in American law into a concept that "does not involve the States stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved—i.e., if the State is only a nominal party without a real interest of its own—then it will not have standing under the *parens patriae* doctrine." *Id.* at 600, 102 S.Ct. 3260. Although *Snapp* did not precisely define the parameters of a state's quasi-sovereign interests, it explained that they do encompass a state's interests in the "well-being of its populace." *Id.* at 602, 102 S.Ct. 3260. In line with these principles, when a state seeks to establish standing to sue in its *parens patriae* capacity, it must: (1) "allege [ ] injury to a sufficiently

substantial segment of its population;" (2) "articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party;" and must (3) "express a quasi-sovereign interest." *Id.* at 607, 102 S.Ct. 3260. Additionally, the U.S. Court of Appeals for the Second Circuit has required that in order to support *parens patriae* standing, a state must demonstrate that it is acting on behalf of its citizens where individuals could not obtain complete relief through a private suit. *People of the State of New York v. 11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir.1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir.1983) (en banc).

Because states must invoke a quasi-sovereign authority in order to establish *parens patriae* standing, a *parens patriae* action is a form of visitation, and is prohibited by section 484(a) of the National Bank Act, as interpreted by 12 C.F.R. § 7.4000, unless Congress intended to provide otherwise. *See Guthrie v. Harkness*, 199 U.S. 148, 158-59, 26 S.Ct. 4, 50 L.Ed. 130 (1905); *see also* Banking Activities and Operations, 69 Fed.Reg. 1895, 1899 (Jan. 13, 2004) ("private civil cases in pursuit of personal claims against national banks, . . . unlike attempts by state authorities to exercise authority over national banks using the courts, do not amount to visitations").

B. The Fair Housing Act Does Not Permit *Parens Patriae* Actions Otherwise Barred by Section 484 of the National Bank Act

The FHA prohibits "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). Real estate-related transactions for the purposes of the Act include making or purchasing loans for the purchase, construction, improvement, repair, or maintenance of a dwelling, and making or purchasing loans "secured by residential real estate." 42 U.S.C. § 3605(b)(1)(A) and (B). The FHA establishes several means of enforcing these provisions and the other anti-discrimination provisions in the Act, including administrative enforcement by the U.S. Secretary of Housing and Urban Development; administrative enforcement by certified state or local agencies; private causes of action by aggrieved persons; and civil enforcement by the U.S. Attorney General where that federal official discerns a "pattern and practice" of violations. *See* 42 U.S.C. §§ 3610, 3610(f), 3613(a), 3614. The parties to this litigation agree that the New York State Attorney General is not a certified state agency for these purposes.

The Attorney General asserts the authority to regulate the mortgage lending activities of the national banks through litigation brought in the state's

parens patriae capacity pursuant to 42 U.S.C. § 3613, which is part of the Fair Housing Act, entitled, "Enforcement by private persons." That section grants an "aggrieved person" the right to bring an action for appropriate relief from an alleged discriminatory housing practice. 42 U.S.C. § 3613(a)(1)(A). The FHA defines an "aggrieved person" as "any person who—(1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." 42 USCA § 3602(i).

This grant of standing to any "aggrieved person" is the type of statutory language cited by the Second Circuit as that which is generally interpreted to reflect Congressional intent to permit states to enforce the rights protected by federal statutes through *parens patriae* actions. *See Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110, 121 (2d Cir.2002) (*"Physicians Health Services"*) (" 'the federal statutes under which states have been granted *parens patriae* standing all contain broad civil enforcement provisions that permit suit by any "person" that is "injured" or "aggrieved." ' ") (quoting *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 103 F.Supp.2d 495, 509-10 (D.Conn.2000)) (citing, *inter alia*, 42 U.S.C. § 3613(a)(1)(A)); *see also Support Ministries for Persons with Aids v. Village of Waterford*, 799 F.Supp. 272, 277 (N.D.N.Y.1992) (concluding that New York alleged sufficient injury to its quasi-sovereign interest in the health and well-being of its citizens to maintain a *parens patriae* action challenging an

allegedly discriminatory denial of building permits for a facility for persons living with AIDS as violative of the FHA, the Fourteenth Amendment, and state and local anti-discrimination laws).

However, just as the Supreme Court found in *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 259, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), the question of whether the Attorney General may bring a *parens patriae* action against national banks to enforce the FHA's fair lending provisions is a question that "cannot be resolved simply by reference to any general principles governing *parens patriae* actions." *Id.* at 259, 92 S.Ct. 885.

In *Hawaii v. Standard Oil Co. of California*, the Supreme Court was faced with the question of whether a state could bring a *parens patriae* action seeking monetary damages—as opposed to injunctive relief—based on injury to its quasi-sovereign interests pursuant to federal antitrust laws. *See* 405 U.S. at 260-61, 92 S.Ct. 885. The Court considered the federal statutory scheme, its legislative history, and the practical impact of allowing *parens patriae* actions. The Court concluded that, in light of the absence of an express provision in the statutory text permitting *parens patriae* actions, Congress did not intend to permit states to recover monetary damages for alleged harm to their quasi-sovereign interests. *See id.* at 263-66, 92 S.Ct. 885. Congress responded to that decision and subsequently amended the law to *explicitly* permit *parens patriae* suits by states seeking monetary damages. *See New York ex rel Vacco v. Reebok International Limited*, 96 F.3d

44, 46 (2d Cir.1996); *see also* 15 U.S.C. § 15c(a)(1) ("Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.").

In *Physicians Health Services*, the Second Circuit similarly sets forth that in determining whether a state may assert *parens patriae* standing pursuant to a particular federal statutory provision, a court's task is to discern whether "Congress intended to allow for such standing." *See* 287 F.3d at 120-21. This analysis begins with a consideration of the relevant statutory scheme, including what types of enforcement mechanisms are—and are not—expressly provided for by Congress. *See id.* In *Physicians Health Services*, finding that ERISA's carefully drawn limitations on parties authorized to sue did not include an express provision for suits by states, the Second Circuit concluded that Congress did not intend to permit *parens patriae* suits by states, and thus held that Connecticut lacked statutory standing to bring an action on behalf of the state's citizens challenging an insurance company's use of a drug formulary system. *Id.* at 121.

Here, when the broad enforcement provisions of the FHA are read in conjunction with section 484 of the National Bank Act, the absence of any express provision

in the Fair Housing Act authorizing states to bring *parens patriae* actions against national banks leads to the conclusion that Congress did not intend, in granting any "aggrieved person" a private right of action, to implicitly override section 484's limitation on the powers of states to exercise visitorial powers over national banks.

Section 484 of the National Bank Act, as interpreted by the OCC, prohibits states from: "[e]nforcing compliance with any applicable federal or state laws concerning" the "activities authorized or permitted pursuant to federal banking law." *See* 12 C.F.R. §§ 7.4000(a)(2)(iii) and (iv). The OCC has read the exceptions to section 484's limitation on states' visitorial powers narrowly, reasoning that Congress intended to create a system of national banks protected from intrusive state regulation. *See* Banking Activities and Operations, 69 Fed.Reg. 1895, 1900 (Jan. 13, 2004). In considering whether 42 U.S.C. § 3613(a)(1)(A) evinces an intent by Congress to create an exception to the limitation on state visitorial powers, it is helpful to contrast the FHA provision at issue here with instances where Congress has indisputably created exceptions for state visitation over national banks.

In each of the exceptions noted in 12 C.F.R. § 7.4000(b)(1) in which Congress has created exceptions authorizing states to exercise visitorial authority over national banks, it has done so explicitly, carefully defining the parameters of the states' authority. *See* 12 U.S.C. § 484(b) ("Notwithstanding subsection (a)

of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."); *see also* Federal Unemployment Tax Act, 26 U.S.C. § 3305(c) ("Nothing contained in [12 U.S.C. 484], shall prevent any State from requiring any national banking association to render returns and reports relative to the association's employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund"). Each of these exceptions to the rule limiting states' visitorial authority is explicit, narrowly drawn, and carves out an exception pertaining to non-banking activities.

In contrast, the FHA neither explicitly includes states in its definition of "aggrieved persons" nor explicitly grants states the authority to bring actions in their *parens patriae* capacity. It does grant the U.S. Attorney General the authority to institute civil actions where there is a pattern and practice of violations, *see* 42 U.S.C. § 3614, but fails to extend similar authority to states. It directs the U.S. Secretary of Housing and Urban Development to refer administrative complaints to state or local agencies that have been certified as providing substantially equivalent protections, *see* 42 U.S.C. § 3610(f), but, as noted, the parties agree that that carefully crafted certification and referral

mechanism does not provide the basis for the Attorney General's threatened action. Finally, section 3608(d) reveals that Congress was cognizant of the role of federal banking regulators when it enacted the enforcement provisions of the FHA, *see* 42 U.S.C. § 3608(d), yet there is no provision expressly creating an exception to section 484 of the National Bank Act to permit states to enforce the FHA's fair lending provisions against national banks.

In light of the several carefully drawn enforcement provisions in the FHA, the explicit exceptions in other instances where Congress clearly intended to permit states to exercise visitorial authority over national banks, and the lack of any similar grant of authority for states to bring *parens patriae* actions pursuant to the FHA's private right of action provision, the Court concludes that 42 U.S.C. § 3613(a) does not reflect an intent by Congress to authorize states to bring *parens patriae* actions against national banks to enforce the FHA's fair lending provisions. *See Physicians Health Services*, 287 F.3d at 121 (citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S.Ct. 708, 151 L.Ed.2d 635 (2002) ("ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.") (emphasis, citations, and internal quotation marks omitted)).

Appendix C

C. Permanent Injunctive Relief Is Warranted

The Attorney General correctly asserts that in order to warrant the requested injunctive relief, the Clearing House must establish that it is threatened with an injury for which there is no adequate remedy at law. The Supreme Court has repeatedly explained that "[i]t is a 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.' " *Morales v. Trans World Airlines,* 504 U.S. 374, 381, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (quoting *O'Shea v. Littleton,* 414 U.S. 488, 499, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)); *see also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

Where it is established that a state's threatened action would violate a federal statute, and an injunction is necessary in order to protect the "underlying substantive purpose" of that statute, injunctive relief may be granted. *See Amoco Production Co. v. Village of Gambell,* 480 U.S. 531, 544, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987); *see also Jennings Water, Inc. v. City of North Vernon, Ind.,* 895 F.2d 311, 318, n. 6 (7th Cir.1989).

Here, the Clearing House seeks an injunction barring the state from precisely the type of interference with national banks that section 484 of the National Bank Act is intended to prohibit. *See Wells Fargo v. Boutris,* 265 F.Supp.2d 1162, 1178-79 (E.D.Cal.2003) (granting permanent injunction barring state regulation

of national bank's operating subsidiary), *aff'd in part and reversed in part on other grounds*, 419 F.3d 949 (9th Cir.2005); *see also First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132, 150-51 (D.Conn.1999) (granting the OCC's motion for preliminary injunction on showing that threatened state regulation of national banks was likely prohibited by 12 C.F.R. § 484(a)). Accordingly, the Clearing House is entitled to the injunctive relief provided in *OCC v. Spitzer* as well as the additional measure of injunctive relief enjoining the threatened *parens patriae* actions that has not already been provided in *OCC v. Spitzer*.

V. Conclusion

For the reasons set forth above, the Clearing House's application for permanent injunctive relief is granted. Plaintiff is entitled to the injunctive relief provided in *OCC v. Spitzer* for the reasons set forth in the Opinion and Order in that action dated October 12, 2005. In addition, because an action brought in the state's *parens patriae* capacity to enforce the Fair Housing Act's fair lending provisions against the Clearing House national bank members or their operating subsidiaries constitutes a form of visitorial authority prohibited by section 484(a) of the National Bank Act, and is not authorized by federal law, the New York State Attorney General is enjoined from instituting any judicial action premised on the state's *parens patriae* authority to enforce the Fair Housing Act's fair lending provisions against the Clearing House's national bank members or their operating subsidiaries.

Appendix C

Dated: New York, New York
October 12, 2005

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING, DATED AND FILED JUNE 5, 2008

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Nos: 05-5996-cv (Lead)
05-6001-cv (Con)

Catherine O'Hagan Wolfe
CLERK OF THE COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 5th day of June two thousand and eight,

The Clearing House Association, L.L.C.,

Plaintiff-Appellee,

Office of the Comptroller of the Currency,

Plaintiff-Counter-Defendant-Appellee,

v.

Andrew M. Cuomo, in his official capacity as Attorney General for the State of New York,

Defendant-Counter-Claimant-Appellant.

Appendix D

ORDER

Appellant Andrew M. Cuomo, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/ Franklin Perez
Frank Perez, Deputy Clerk

APPENDIX E — CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED

U.S. Const., Art. VI, Cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 484

> **Sec. 484. Limitation on visitorial powers**
>
> (A) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (B) Notwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Appendix E

12 C.F.R. § 7.4000

Sec. 7.4000 Visitorial powers.

(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(c) *Report of examination.* The report of examination made by an OCC examiner is designated solely for use in the supervision of the bank. The bank's copy of the report is the property of the OCC and is loaned to the bank and any holding company

thereof solely for its confidential use. The bank's directors, in keeping with their responsibilities both to depositors and to shareholders, should thoroughly review the report. The report may be made available to other persons only in accordance with the rules on disclosure in 12 CFR part 4.

OPPOSITION BRIEF

114 (6) No. 08-453

Supreme Court, U.S.
FILED
DEC 8 - 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,

Petitioner,

—v.—

THE CLEARING HOUSE ASSOCIATION L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF THE CLEARING HOUSE ASSOCIATION L.L.C.

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Of Counsel

December 8, 2008

QUESTION PRESENTED

Was the New York State Attorney General properly enjoined from demanding records of national banks relating to their mortgage lending, and from commencing proceedings to enforce state laws against national banks based on their mortgage lending, because such demands and enforcement proceedings would constitute an exercise of "visitorial powers" prohibited by 12 U.S.C. § 484 and 12 C.F.R. § 7.4000, a regulation promulgated by the Office of the Comptroller of the Currency?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent The Clearing House Association L.L.C. (the "Clearing House") states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

In this action the Clearing House asserted associational standing on behalf of its members, and the decree entered by the District Court specifically applies to the national banks that were members of the Clearing House when the decree was entered: Bank of America, National Association; Citibank, N.A.; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. All these banks are still members of the Clearing House except LaSalle Bank National Association.

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Respondent The Clearing House Association L.L.C. (the "Clearing House") respectfully opposes the petition of the Attorney General for the State of New York for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit dated December 4, 2007.

STATEMENT OF THE CASE

The Court of Appeals held that the Office of the Comptroller of the Currency ("OCC") has the exclusive authority to investigate and enforce national banks' compliance with state fair-lending laws. The Second Circuit based its decision on a regulation promulgated by the OCC, 12 C.F.R. § 7.4000, concerning the preclusive effect of a provision of the National Bank Act ("NBA") now codified as 12 U.S.C. § 484 ("§ 484"). That decision is consistent with each Court of Appeals that has applied section § 7.4000. *See National City Bank v. Turnbaugh*, 463 F.3d 325 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2096 (2007); *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), *aff'd*, 127 S. Ct. 1559 (2007); *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005); *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 2093 (2007). Twenty-eight years ago, long before the OCC adopted the relevant provisions of § 7.4000, the Third Circuit reached the same conclusion based on § 484 itself. *Nat'l State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 988-89 (3d Cir. 1980).

Indeed, Petitioner is asking this Court to re-examine its decision of less than two years ago in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), where this Court applied § 484 and quoted

§ 7.4000 with approval in holding that a state could not confer on its officer "enforcement authority over mortgage lending, or any other banking business done by national banks." 127 S. Ct. at 1569. Guided by *Watters*, the Second Circuit affirmed the District Court's decree barring New York's Attorney General from investigating or exercising enforcement authority over the mortgage lending activities of national banks. Because the Second Circuit's decision follows both the recent precedent of this Court in *Watters* and settled authority excluding states from the regulation of national banks' exercise of their authorized banking powers, there is no reason to grant certiorari.

A. The National Bank Act's Prohibition Against State Investigation and Enforcement With Respect to National Banks' Exercise of Their Powers Under the Act

Section 484 plainly prohibits the exercise of "visitorial powers" over national banks "except as authorized by Federal law." 12 U.S.C. § 484(a). Pursuant to § 484 and rule-making authority under 12 U.S.C. § 93a, the OCC promulgated 12 C.F.R. § 7.4000 to make clear, *inter alia*, that § 484 precludes state officials from "inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions" against national banks with respect to activities authorized by the NBA.

In *Watters*, the Court explained that "[n]early two hundred years ago, in *McCulloch v. Maryland*, 17 U.S. [(4 Wheat.)] 316 (1819), this Court held federal law supreme over state law with respect to

national banking." 127 S. Ct. at 1566. In accordance with this federal supremacy over national banking, when Congress created a new national banking system in 1864, it expressly and clearly prohibited state exercise of visitorial powers over national banks by enacting the provision now codified as § 484(a) "[t]o prevent inconsistent or intrusive state regulation from impairing the national system." *Id.*; *see* Act of June 3, 1864, ch. 106, 13 Stat. 99.

Although § 484 has been amended since its enactment (largely to add exceptions to the general exclusion, none of which is applicable here), its essential prohibition on state exercise of visitorial powers has remained unchanged. The goal of that prohibition is evident from the legislative history of the Act of 1864. In the midst of a rebellion by state governments, the sponsors of the Act recognized that a national bank "must not be subjected to any local government, state or municipal; [but] must be kept absolutely and exclusively under that government from which it derives its functions." CONG. GLOBE, 38TH Cong., 1ST Sess. 1893 (1864) (remarks of Sen. Sumner). Senator Sumner read from *McCulloch v. Maryland* to stress that states could not be permitted to have power over national banks. "[A] power to create implies a power to preserve. . . . [A] power to destroy, if wielded by a different hand, is hostile to, and incompatible with, the powers to create and preserve." *Id.*[1]

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[1] Between the termination of the charter of the Second Bank of the United States in 1836 and enactment of the NBA in 1864, the nation's banking system was a "decentralized, unstable structure of state banks" with frequent failures and no uniform federal currency. James M. McPherson, *Battle Cry of Freedom*

(footnote continued)

In keeping with Congress' clear intent, as confirmed by this legislative history, "[i]n the years since the NBA's enactment, [this Court has] repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 127 S. Ct. at 1566-67. The Court reemphasized in *Watters* that

> the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is an abuse, because it is the usurpation of power which a single State cannot give.

Id. at 1567 (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875)) (alteration in original).

The NBA established the OCC as the primary regulator of national banks. As the modes of

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594 (1988). In the absence of federal involvement, banking was governed by disparate state regulation. *See generally* David M. Gische, *The New York City Banks and the Development of the National Banking System, 1860-1870*, 23 Am. J. Legal Hist. 21, 24-25 (1979). Petitioner tries to downplay the Act's legislative history by arguing — based on a citation to a single page of the debates leading to the passage of the National Currency Act of 1863 — that the "primary purpose" of the Act was to address "wartime federal revenue needs." (Pet. 3.) Although that was one purpose, the ultimate purpose of Congress in enacting the NBA was to "launch[] the modern national banking system . . . empowering the newly created national banks to issue and accept a uniform national currency." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 449 (1993).

government regulation of banking have changed, the OCC's role has evolved. Thus, in 1966, Congress explicitly granted the OCC authority to review and compel national banks' compliance with any applicable law regulating the business of banking, state or federal. 12 U.S.C. § 1818(b), (e), (i)(2); *see Long*, 630 F.2d at 988 (recognizing OCC's broad enforcement authority).

Congress further confirmed the OCC's exclusive enforcement authority in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal"), which amended federal banking laws to permit interstate branching by national banks. Congress provided that those branches would be subject to "[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches," except where preempted by federal law or where state law discriminates against national banks' branches. 12 U.S.C. § 36(f)(1)(A). At the same time, however, Congress made clear that "[t]he provisions of any State law to which a branch of a national bank is subject under this paragraph *shall be enforced*, with respect to such branch, *by the Comptroller of the Currency*." 12 U.S.C. § 36(f)(1)(B) (emphasis added).[2]

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[2] Petitioner attempts to nullify this clear language by arguing that the provision is somehow limited because, after prescribing that enforcement "shall" be by the Comptroller, the statute does not add the word "exclusively." Such additional language would have been superfluous because the legislation does not provide for any state enforcement at all. Petitioner then argues that the provision was inserted into the Act "[i]n light of OCC's previously expressed doubts about whether it could enforce

(footnote continued)

Consistent with the OCC's plenary licensing, regulatory, supervisory, examination, and enforcement authority over national banks, and pursuant to its rule-making authority under 12 U.S.C. § 93a, the OCC amended its regulation interpreting § 484 in 1999, pursuant to a comprehensive notice and comment procedure, to make clear that state officials could not investigate the activities of national banks or bring state law enforcement actions against national banks. *See* 64 Fed. Reg. 31,749, 31,751 (June 14, 1999); 64 Fed. Reg. 60,092, 60,094 (Nov. 4, 1999).[3] In 2004, the OCC further amended the regulation to provide additional examples of prohibited visitation and to clarify the meaning of the statutory "courts of justice" exception to the generally applicable rule. *See* 68 Fed. Reg. 6363, 6467 (Feb. 7, 2003); 69 Fed. Reg. 1895, 1895-96 (Jan 13, 2004).

B. Attorney General Spitzer's Mortgage Lending Investigation

In 2002, the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") amended its regulations under the Home Mortgage

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state law." (Pet. 7.) That argument is completely unsupported by the legislative history and, as discussed above, Congress had expressly authorized the OCC to enforce state law in 1966.

[3] Although at various times Petitioner characterizes the OCC as having created a recent break with "historical" precedent (Pet. 8-10), the OCC first codified its interpretive rulings with respect to the exercise of visitorial powers by state officials in 1971 in 12 C.F.R. 7.6025(b). 36 Fed. Reg. 17,000, 17,013 (Aug. 26, 1971).

Disclosure Act, 12 U.S.C. §§ 2801-2810 ("HMDA"), to require disclosure of information concerning the interest rates for mortgage loans, in addition to the data already required about the race, sex, and income of loan applicants. The new pricing data were first reported beginning on March 31, 2005, for loans originated in 2004.

The Federal Reserve Board and its staff have repeatedly emphasized that the additional HMDA data alone cannot prove unlawful discrimination, and cautioned that "unwarranted accusations of illegal bias" based on the HMDA data "may lead to unnecessary restrictions on the availability of loans to less-creditworthy applicants."[4] As Federal Reserve Board Governor Edward M. Gramlich explained in 2005:

> Although the addition of the price data significantly increases the robustness of HMDA data, the data alone do not prove discrimination. . . . The new HMDA data are clearly limited: they do not include credit scores, loan-to-value ratio, or consumer debt-to-income ratio — all factors relevant to the cost of credit. Because these important determinants of price are missing, one cannot draw definitive conclusions about whether particular lenders discriminate unlawfully or

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[4] Robert B. Avery *et al.*, *New Information Reported under HMDA and Its Application in Fair Lending Enforcement*, 2005 Fed. Reserve Bull. 344, 393 (2005), *available at* http://www.federalreserve.gov/pubs/bulletin/2005/summer05_hmda.pdf.

take unfair advantage of consumers based solely on a review of the HMDA data.[5]

Nonetheless, in April 2005, immediately after the HMDA interest rate data first became available — and well before the Federal Reserve staff had completed their analysis of the data — then-Attorney General Eliot Spitzer commenced an investigation, based on the HMDA data alone, concerning alleged potential violations of state fair lending laws by certain national banks.[6] In particular, Spitzer requested that the national banks provide information regarding their loans and real-estate lending practices and threatened to issue subpoenas and bring enforcement proceedings against national banks with respect to their mortgage lending activities. (*See* Pet. App. 3a-4a.)

C. The Proceedings Below

The Clearing House brought this action seeking an injunction against Spitzer's violation of § 484 and the OCC's regulations, and the case was consolidated with a similar proceeding brought by the OCC. Following trial, the District Court held that Spitzer's investigation and threatened

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[5] Edward M. Gramlich, Governor, Bd. of Governors of the Fed. Reserve Sys., Remarks to the National Association of Real Estate Editors (June 3, 2005), *available at* http://www.federalreserve.gov/boarddocs/speeches/2005/20050603/default.htm.

[6] Spitzer also invoked the Federal Equal Credit Opportunity Act ("ECOA"), but he did not rely on ECOA during the proceedings below, presumably because ECOA expressly provides that the OCC shall enforce that statute as it applies to national banks, 15 U.S.C. § 1691c(a)(1)(A).

enforcement were barred by the NBA as interpreted by § 7.4000. Accordingly, the District Court enjoined the Attorney General from "issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices," from compelling compliance with his existing information demands, and from instituting actions against national banks to enforce state fair lending laws. (*See* Pet. App. 116a-117a.)

The Court of Appeals affirmed the District Court insofar as it enjoined Petitioner's investigation and enforcement proceeding pursuant to state law.[7] Noting that in *Watters* this Court had "implied that investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision" (Pet. App. 20a), the Second Circuit concluded that "[i]t seems clear . . . after *Watters*, that investigation and enforcement powers of the type the Attorney General has sought to exercise here are at least in some sense 'visitorial,' whether or not they unambiguously fall within the scope of § 484(a)." (Pet. App. 21a.) Accordingly, the Court of Appeals upheld and applied the OCC's regulation, § 7.4000:

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[7] In the Clearing House action, the District Court further held that the Attorney General could not bring a *parens patriae* action under the Fair Housing Act. (Pet. App. 141a.) The Court of Appeals vacated that ruling on ripeness grounds. (Pet. App. 32a-41a.) Petitioner does not seek review of that portion of the Court of Appeals decision. (*See* Pet. 12 n.3.)

> In drawing the lines that it did in § 7.4000(a), the OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute . . . . [T]he OCC's regulation furthers Congress's intent, through § 484(a) and other provisions of the NBA, to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers, such as real estate lending. *Watters*, 127 S. Ct. at 1567. At the same time, it preserves state sovereignty by leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers . . . .

(Pet. App. 28a-29a.)[8] Petitioner's request for rehearing en banc was denied.

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[8] Thus, there is a role for the states, contrary to Petitioner's assertion that 12 C.F.R. § 7.4000 covers "virtually all state enforcement" (Pet. 2). The distinction is between enforcement of state laws that affect a national bank's exercise of its authorized banking powers and enforcement that does not affect the exercise of those powers. Petitioner's attempt to limit § 484 based on whether the substantive state law is preempted (*e.g.*, Pet. 6) is inherently nonsensical because if the state law is preempted, there is no enforcement power to be exercised by anyone.

REASONS FOR DENYING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

Petitioner's first ground for seeking certiorari is an asserted conflict between the Second Circuit's decision and *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) (hereinafter "*St. Louis*"), a decision that nowhere cites § 484. For several independent reasons, no such conflict exists.

First, Petitioner argues that in deferring to the OCC's "construction of 'visitorial powers,' the Court of Appeals *avoided* this Court's prior *interpretation* of the NBA in *St. Louis*, with its more measured and traditional *construction* of the term." (Pet. 19 (emphasis added).) Contrary to Petitioner's argument, there was nothing for the Second Circuit to "avoid" because this Court did not provide any "interpretation" or "construction" of "visitorial powers" or § 484 in *St. Louis*. To the contrary, neither the opinion nor the dissent in *St. Louis* even once mentions "visitorial powers" or the predecessor to § 484 then in force (Rev. Stat. § 5241).[9]

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[9] Petitioner's entire argument is premised on the citation of Rev. Stat. § 5241 in the summary of the parties' submissions in the syllabus of the official report (*see* Pet. 16 & n.4) and the suggestion that the Court must have "necessarily rejected" one of those submissions (Pet. 15-16). The Court may have dismissed or disregarded the parties' arguments concerning the statute without comment for a variety of reasons, including those set forth herein. *St. Louis* cannot reasonably be read as

(footnote continued)

Second, Petitioner has conceded that his investigation and threatened enforcement action under state law are barred if the OCC's regulation is upheld. (Pet. App. 15a n.6.) The Second Circuit affirmed the District Court's injunction because it concluded that the OCC's regulation should be sustained under the principles announced by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Thus, the Second Circuit's decision could not possibly conflict with *St. Louis* because that case was decided decades before the OCC issued 12 C.F.R. § 7.4000. Even if the OCC's regulation were inconsistent with an interpretation of § 484 adopted *sub silentio* in *St. Louis*, this Court made clear less than three years ago that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Because *St. Louis* did not address or even mention § 484, it certainly did not hold that any construction of § 484 "follows from the unambiguous terms of the statute."

Third, even if it is assumed that the Court in *St. Louis* considered and construed § 484 without ever referring to it, *St. Louis* involved enforcement of a state law prohibiting national banks from establishing branches, at a time that the NBA did

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providing a construction, much less a definitive construction, of a statute it never mentions.

not authorize national banks to establish branches. *See St. Louis*, 263 U.S. at 659-60. For that reason, the state action in *St. Louis* did not involve a prohibited interference with a bank's exercise of its authorized powers, which is the touchstone of the *Watters* analysis. It is indisputable that the mortgage lending in question here involves a national bank's lawful powers. Although Petitioner suggests that enforcement of state fair lending laws against the exercise of that authority likewise "by definition do[es] not substantially interfere with a national bank's exercise of its lawful powers" (Pet. 18), that argument misses the point explicitly made by this Court in *Watters* that subjecting national banks' mortgage lending "to the State's investigative and enforcement machinery *would surely interfere* with the banks' federally authorized business." 127 S. Ct. at 1568 (emphasis added).

That interference arises because "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking . . . is precisely what the NBA was designed to prevent." 127 S. Ct. at 1568. For that reason, "[s]ecurity against significant interference by state regulators is a characteristic condition of the 'business of banking' conducted by national banks." *Id.* at 1571. Unlike branch banking at the time of *St. Louis* (*see St. Louis*, 263 U.S. at 659 (premising ruling on fact that branching was not an "incidental power" conferred on national banks by the NBA)), real estate lending, the "banking business" Petitioner sought to investigate, is specifically authorized by the NBA, 12 U.S.C. § 371(a). It is, therefore, "[b]eyond genuine dispute [that] state law may not significantly burden" this power through duplicative enforcement. *Watters*, 127 S. Ct. at 1567. What Petitioner fails to

recognize is the crucial distinction between state enforcement of alleged violations of state law based on how an authorized banking power is exercised — which *Watters* prohibits — and state enforcement of state law that does not affect the exercise of powers authorized by the NBA, which *St. Louis* and *Watters* permit.[10]

None of the other three decisions Petitioner invokes as "settled contrary precedent" to the Second Circuit's opinion (Pet. 2, 16) is remotely close to that. Both *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) and *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917) concerned statutes in which Congress had expressly conditioned grants of powers to national banks upon state authorization. In *Watters*, this Court noted with specific reference to *Plant City* that the holdings in such decisions cannot be "ripped from their context" to suggest that States have authority to regulate national banks as they do state banks. 127 S. Ct. at 1569 n.7. In the case of national banks' mortgage lending powers — unlike the branching authorized by the McFadden Act at issue in *Plant City* or the trustee and brokerage powers at issue in *Bay City* — the NBA does not condition the power

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[10] The holding in *St. Louis* is also inapplicable here because, when *St. Louis* was decided, Missouri's law would have been unenforceable if the state could not enforce it. *See* 263 U.S. at 660. State enforcement was thus necessary, as the District Court held, "to fill a gap in the law." (Pet. App. 86a.) Those circumstances no longer exist because since 1966 the OCC has had the authority to enforce all laws, state and federal, regulating the business of banking. 12 U.S.C. § 1818; *see Long*, 630 F.2d at 988.

"upon a grant of state permission," rendering the holdings in those decisions inapposite. *Id.*[11]

The final decision of this Court cited by Petitioner as supposedly in conflict with the Second Circuit's opinion, *Waite v. Dowley*, 94 U.S. 527 (1876), is even further afield. In *Waite*, the Court addressed the question of whether a state official could require a national bank to disclose a list of its shareholders and dividends paid to them for state taxation purposes. *Id.* at 532. The disclosure sought had nothing at all to do with state regulation of the bank's federally authorized business and did not involve any exercise of visitorial authority.[12]

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[11] For similar reasons, appellate decisions involving branching issues cited by Petitioner and his *amici* (including, *Jackson v. First National Bank of Valdosta*, 349 F.2d 71, 74 (5th Cir. 1965) (which relied on "the absence of any contraindicative federal policy") and *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967)) do not support review.

[12] Additional cases cited by Petitioner's *amici* as supposedly contrary to the Second Circuit's decision similarly do not address the exercise of visitorial powers. For example, *National Bank v. Kentucky*, 76 U.S. (9 Wall.) 353 (1870), concerned state taxation of bank shares, not state regulation of the business of banking, *see id.* at 362-63. *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944), concerned the transfer of abandoned bank deposits to the state, and the Court specifically noted that the state's power was limited to demanding payment of accounts "in the same way and to the same extent that the depositors could" and compared the state law to "tax laws, the attachment laws, or the laws for the administration of estates of decedents or of missing or unknown persons," *id.* at 249, 252. *Atherton v. FDIC*, 519 U.S. 213, 222-223 (1997), was an action in which the FDIC as receiver asserted claims on behalf of a failed savings association and had nothing to do with state visitation of national banks.

The fact that *none* of these decisions cited by Petitioner and his *amici* addresses the scope or meaning of § 484 at all demonstrates conclusively the absence of a conflict.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT AN "IMPORTANT" OR "UNRESOLVED" QUESTION CONCERNING THE APPLICATION OF *CHEVRON* DEFERENCE

The decision below does not present any "important and unresolved" question concerning the application of *Chevron* deference. (Pet. 19.) In particular, there is no merit to Petitioner's principal assertion that the Second Circuit's decision deferring to the OCC's regulation (which Petitioner acknowledges to be consistent with a recent decision of the Sixth Circuit) (Pet. 19) conflicts with the Tenth Circuit's decision in *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571 (10th Cir. 1991), (Pet. 19-20), in which state law was found to be preempted.

In *Harmon*, the Tenth Circuit addressed whether certain regulations regarding the transportation of hazardous materials promulgated by the Colorado Public Utilities Commission were preempted by regulations issued by the United States Department of Transportation ("DOT") under the Federal Hazardous Materials Transportation Uniform Safety Act of 1990 ("HMTUSA"). 951 F.2d at 1574. In that case, the United States Department of Energy had obtained "advisory, nonbinding opinions" from DOT that the Colorado regulations were preempted by the DOT regulations. *Id.* at

1575, 1578. In considering the weight to accord those advisory determinations, the Tenth Circuit noted that "DOT's expertise, in part, lies in determining the scope and coverage of its regulations and whether Colorado's regulations cover the same subject matter." *Id.* at 1579. Accordingly, the Tenth Circuit concluded that it *would* defer to DOT's advisory determinations "that its regulations overlap with Colorado's regulations," while independently reviewing the legal issue of preemption under HMTUSA's express preemption standards. *Id.* Based on DOT's determinations that Colorado's regulations overlapped with federal law, the Tenth Circuit concluded that they created an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and were thus preempted. *Id.* at 1579-83.

There is no inconsistency between *Harmon* and the Court of Appeals' decision in this case for two reasons. First, there is an obvious difference between an informal advisory opinion of the type at issue in *Harmon* and a formal regulation such as § 7.4000 that is subject to notice and comment. In *Harmon* the Tenth Circuit declined to defer to "advisory, nonbinding opinions" (951 F.2d at 1578) of the DOT concerning certain preemption issues. The Tenth Circuit was not asked to address the preemptive effect of a regulation having the force of law adopted pursuant to an agency's substantive rule-making authority, such as the OCC's authority under 12 U.S.C. § 93a. As noted below, this Court has made clear that a regulation adopted pursuant to statutory authority has the same preemptive force as a statute itself. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

Second, the question here, unlike in *Harmon*, is not whether a particular state statute is preempted by applicable federal law, but the substantive meaning of a federal statute that preempts state authority. Spitzer conceded that the regulation, as written, prohibited what he sought to do. (Pet. App. 15a n.6.) This Court rejected a similar argument in *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996), in words that are directly applicable to Petitioner's argument here:

> This argument confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive. We may assume (without deciding) that the latter question must always be decided *de novo* by the courts. That is *not* the question at issue here; there is no doubt that [the statute at issue] pre-empts state law.

517 U.S. at 744 (emphasis in original). Here, there is similarly "no doubt" that § 484 preempts state exercise of "visitorial powers." Accordingly, because the regulation does not determine *whether* the statute is preemptive, but interprets the substantive meaning of the phrase "visitorial powers," as used in the statute, this case does not present the question Petitioner asserts *Smiley* left open. (Pet. 20-21.) In fact, *Smiley* forecloses Petitioner's argument that the OCC's "full-dress regulation" interpreting a provision

of the NBA (517 U.S. at 741), is not entitled to *Chevron* deference.[13]

Indeed, in large part, the *Harmon* decision corresponds with the Second Circuit's deference to the OCC's regulation in that the Tenth Circuit determined to defer to DOT's determination of the scope of federal law in the agency's area of expertise. In particular, the Tenth Circuit deferred to DOT's interpretation of its regulations and determination that federal law "overlap[ped] with" Colorado law (951 F.2d at 1579), and here the Second Circuit deferred to the OCC's interpretation of the term "visitorial powers" as used in the NBA.

The OCC's adoption of § 7.4000 involved the interpretation of the NBA and determinations concerning how responsibility for investigations and enforcement proceedings involving national banks should be allocated in order best to achieve the objectives of the Act. These are the sort of questions within the expertise of the OCC on which this Court has repeatedly held that the OCC is entitled to deference. The Court has "settled" that the OCC's "reasonable" interpretation of the NBA is entitled to

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[13] Similarly, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), did not "deflect[]" (Pet. 21) any question of deference presented here. In *Riegel*, the Court held that the medical device statute at issue was unambiguous, but suggested that, had it found ambiguity, it would have applied the appropriate standard of deference to an agency position set forth in an amicus brief (*i.e.*, "*Skidmore*" rather than *Chevron* deference). 128 S. Ct. at 1009. As Petitioner acknowledges, however, that lesser standard of deference would have been a function of the fact that the agency's views were not expressed in a regulation, in contrast to the present case. (Pet. 21.)

"controlling weight" under *Chevron* unless Congress' intent is unambiguously to the contrary. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (internal quotations omitted). Thus, there is no conflict between the Court of Appeals' decision in this case and the Tenth Circuit's decision in *Harmon*.[14]

Contrary to Petitioner's assertion of a circuit conflict, the Courts of Appeals that have considered the issue have uniformly reached the same conclusion: The OCC's regulations interpreting the NBA's prohibition of state exercise of visitorial powers are entitled to deference under *Chevron*. *See Nat'l City Bank v. Turnbaugh*, 463 F.3d at 331-33; *Wachovia Bank, N.A. v. Watters*, 431 F.3d at 560-63; *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d at 958-62; *Wachovia Bank, N.A. v. Burke*, 414 F.3d at 315-21.

The Second Circuit's decision is also consistent with a closely analogous ruling of the Third Circuit that has not been questioned by this Court or any Court of Appeals since it was decided nearly three decades ago. In *Long*, the Third Circuit held that § 484 prohibited New Jersey officials from enforcing state anti-redlining legislation against national banks, even though the legislation was not substantively preempted. In that decision, the Third Circuit observed that "when state law prohibits the practice of redlining, its enforcement so directly

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[14] In *Watters*, the petitioner also invoked *Harmon* in her petition for certiorari, but then failed to cite *Harmon* even once in her brief on the merits. *Compare* Pet. for Writ of Certiorari, Case No. 05-1342 *with* Brief for the Petitioner, Case No. 05-1342.

implicates concerns in the banking field that the appropriate federal regulatory agency has jurisdiction." 630 F.2d at 988.[15]

Petitioner also argues that the OCC's rule-making should be disregarded because the OCC lacks "institutional competence" (Pet. 22-23) to promulgate preemptive regulations interpreting the NBA. But this Court has repeatedly upheld the OCC's rule-making interpreting the scope of the Act, *see, e.g.*, *Smiley*, 517 U.S. at 739-44 (deferring to OCC's interpretation of the term "interest"); *NationsBank*, 513 U.S. at 256-64 (deferring to OCC's determination that brokering annuities is an incidental power of national banks), and the OCC's interpretation of § 484 is entitled to no less deference. As the Court of Appeals noted, the OCC's regulation "reached a permissible accommodation of conflicting policies that were committed to it by the

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[15] Various decisions cited by Petitioner and his *amici* do not contradict the Third Circuit's holding in *Long* either because they involved state enforcement of generally applicable laws that "do not directly concern a banking practice" and as to which the OCC therefore "has no direct responsibility for enforcing," *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) (anti-telemarketing and consumer-fraud laws); *see also Alaska v. First National Bank of Anchorage*, 660 P.2d 406, 425 (Alaska 1982) (contract and property law); *Peoples Savings Bank v. Stoddard*, 102 N.W.2d 777, 796-97 (Mich. 1960) (antitrust laws), or because they make no mention of § 484 or the OCC's enforcement role, *e.g.*, *Brown v. Clarke*, 878 F.2d 627 (2d Cir. 1989); *West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W.Va. 1995); *Attorney General v. Michigan National Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981). The District Court distinguished *Fleet* and other such cases on precisely these grounds. (*See* Pet. App. 91a-92a.)

statute," furthering "Congress's intent . . . to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers." (Pet. App. 28a-29a (quoting *Watters*, 127 S. Ct. at 1567).)

Petitioner's appeal to *Gonzalez v. Oregon*, 546 U.S. 243 (2006) is misplaced. In *Gonzalez*, the Court held that the United States Attorney General did not have delegated authority to issue a rule regarding a medical standard for care and treatment of patients because the rule did not fall within his "limited powers, to be exercised in specific ways." 546 U.S. at 259. In contrast, Congress delegated to the Comptroller of the Currency "authoriz[ation] to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a. In accord with this broad grant of authority, this Court has repeatedly held that "'[t]he Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of [*Chevron* deference] with respect to his deliberative conclusions as to the meaning of these laws.'" *NationsBank*, 513 U.S. at 256-57 (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 403-04 (1987)).[16]

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[16] The argument of *amicus* the Conference of State Bank Supervisors ("CSBS") that the OCC does not have authority to issue regulations interpreting § 484 (Br. of CSBS 20-22) is squarely inconsistent with *NationsBank*. The Comptroller's rule-making authority "is as broad as the OCC's statutory responsibilities." *Wells Fargo Bank*, 419 F.3d at 958; *see also Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 883 (D.C. Cir. 1983) (per curiam).

Indeed, if there were ever any doubt about the OCC's authority and "institutional competence" to promulgate preemptive regulations, it was put to rest by the Riegle-Neal Act in which Congress specifically directed the OCC to follow notice and comment procedures "[b]efore issuing any opinion letter or interpretive rule . . . that concludes that Federal law preempts the application to any national bank of any State law regarding community reinvestment, consumer protection [or] fair lending." 12 U.S.C. § 43(a). This Congressional requirement necessarily presupposes that the OCC is authorized to promulgate preemptive regulations, and the OCC is uniquely competent to determine the scope of a statute designed to ensure uniform and fair treatment of the institutions that it is responsible for regulating.[17]

Likewise, there is no merit to the position of *amici* North Carolina, *et al.* that agency "legal analysis" of a statute's meaning is not entitled to deference. (Br. for N.C., *et al.* 10-11). "An agency

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[17] The argument of Petitioner's *amici* that no deference is warranted because of supposed OCC "self-interest" in promulgating preemptive regulations (see Br. for N.C., *et al.* 14-17; Br. of CSBS 8-10; Br. of Nat'l Ass'n of Realtors 16-20) is entirely without merit. The OCC is a governmental agency, not a profit making organization. Its assessment revenues fund its regulatory expenditures, and the increase in assessment revenues resulting from an increase in the number of national banks corresponds to an increase in the regulatory burden on it. That the OCC has publicly announced the benefits of a federal charter — including the long-standing benefit of a single national regulator — is no different from any other government agency pointing out the benefits of the programs it administers and is irrelevant to the *Chevron* analysis.

action qualifies for *Chevron* deference when Congress has explicitly or implicitly delegated to the agency the authority to 'fill' a statutory 'gap,' *including an interpretive gap* created through an ambiguity in the language of a statute's provisions." *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 1004 (Breyer, J., concurring) (emphasis added) (citing *Chevron*, 467 U.S. at 843-44; *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). "Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation [of an ambiguous statute] contained in a regulation." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Thus, as this Court recently and unanimously reaffirmed, where an agency is charged by Congress with authority to promulgate regulations under a statute and does so pursuant to a full notice-and-comment procedure, the agency's view of what the statute means is entitled to deference. *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2349-51 (2007).

III. THE DECISION OF THE COURT OF APPEALS DOES NOT "PROFOUNDLY SHIFT[] THE FEDERAL-STATE BALANCE" OR DEPRIVE THE STATES OF ANY "CORE SOVEREIGN POWER"

Petitioner also seeks review based upon an unsupportable assertion that the Court of Appeals' decision "works a major alteration of the balance of power between the federal and state governments." (Pet. 25.) Contrary to Petitioner's argument, the Court of Appeals' decision conforms to the long-established principle adopted by Congress and emphasized by this Court that the regulation of

national banks' exercise of their powers under the NBA is a matter of federal law, from which Congress deliberately and emphatically excluded any role for the states, subject to certain specified exceptions. Any "major alteration" was the work of the Civil War Congress, not the decision below.

This Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 127 S. Ct. at 1566-67. Thus, "the States can exercise *no control* over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Id.* 1567 (quoting *Farmers' & Mechs.' Nat'l Bank v. Dearing*, 91 U.S. at 34) (emphasis added); *see also Guthrie v. Harkness*, 199 U.S. 148, 159 (1905) ("Except in so far as such corporation was liable to control in the courts of justice, this act was to be the full measure of visitorial power."); *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.").

In *Watters*, the Court rejected the exact contention now reiterated by Petitioner that visitorial powers are limited to "supervision by the jurisdiction that granted [a] corporate charter" and relate to nothing more than "the corporation's use of, and compliance with, its corporate charter" (Pet. 28.). In rejecting that cramped reading, the Court quoted favorably the very regulation at issue here:

> "Visitation," we have explained "is the act of a superior or superintending officer, who visits a corporation to examine into its

> manner of conducting business, and enforce an observance of its laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158, 26 S. Ct. 4, 50 L. Ed. 130 (1905) (internal quotation marks omitted). *See also* 12 CFR § 7.4000(a)(2) (2006) (defining "visitorial" power as "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities").

127 S. Ct. at 1568-69 (alterations in original).

There is likewise no merit to Petitioner's suggestion that the Second Circuit's decision, endorsing a 140-year old limitation on the states' authority over national banks, is an "affront to federalism" "similar" (Pet. 26) to compelling chief law enforcement officers ("CLEOs") to administer a federal regulatory program, which this Court held to be unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997). In *Printz*, Congress attempted to require local law enforcement officials affirmatively to enforce federal handgun legislation. As Justice Scalia explained, "it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun." 521 U.S. at 930. In contrast, the Second Circuit decision does not require a state official to enforce any law, but instead prohibits a state official from enforcing state law in a specific context, just like countless other preemption decisions. *See Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 96 (2d Cir. 2000) (noting irrelevance of *Printz* where federal law "does

not commandeer local authorities to administer a federal program").[18]

There is no merit to Petitioner's invocation of a "presumption against preemption" and "constitutional-avoidance doctrine," relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) and *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (Pet. 26-29). Congress made its intent to preempt state exercise of visitorial powers over national banks abundantly clear in § 484. Moreover, this Court has repeatedly emphasized that a "preemptive regulation's force does not depend on express congressional authorization to displace state law" and a "narrow focus on Congress's intent to supersede state law [is] misdirected." *de La Cuesta*, 458 U.S. at 154; *see City of N.Y. v. FCC*, 486 U.S. 57, 63-64 (1988).

Moreover, Petitioner's reliance on *Gregory* is completely misplaced. That case concerned "a state constitutional provision" establishing the qualifications of state judges, as to which Congressional interference would have "upset the usual constitutional balance" (*id.* at 460), not a field of regulation historically occupied by federal

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[18] The similar holding in *New York v. United States*, 505 U.S. 144 (1992) (cited by Petitioner's *amici*) is inapplicable for the same reason. There the Court invalidated a federal law concerning radioactive waste that would have "'comandeer[ed]' state governments into the service of federal regulatory purposes." *Id.* at 175-76.

authority. In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), this Court unanimously held that "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Id.* at 32. "[A]n 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (citation omitted).

Petitioner's references to the clear-statement and constitutional-avoidance doctrines (Pet. 27) are equally beside the point. Those principles are only applicable to regulations that raise "significant constitutional questions," *Solid Waste*, 531 U.S. at 173-174, or "serious constitutional problems" with respect to the underlying statute, *Edward J. DeBartolo*, 485 U.S. at 575. As the Court of Appeals explained, nothing about the OCC's interpretation "would cast doubt on the constitutionality of the underlying statute" or "invoke[] the outer limit of *Congress's* power so as to trigger a clear statement requirement." (Pet. App. 14a (emphasis in original).)

The attempt by certain *amici* once again to invoke the Tenth Amendment is baseless for the reasons explained in *Watters*:

> As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156 (1992). Regulation of national bank operations is a prerogative

> of Congress under the Commerce and Necessary and Proper Clauses. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58 (2003) (per curiam). The Tenth Amendment, therefore, is not implicated here.

127 S. Ct. at 1573.[19]

There is also nothing unusual about federal law limiting a state's enforcement of its laws against specific classes of persons entitled to federal protection or under specific circumstances. For example, a state judge may not issue, and a state officer may not execute, a writ of habeas corpus for a person in federal custody. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411-12 (1872). Federal law precludes a state from enforcing its criminal laws against persons with diplomatic immunity. 22 U.S.C. § 254d. The states may not enforce their generally applicable taxes against Indians within federally recognized Indian reservations. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1976). Federal law generally prohibits state courts from enjoining peaceful organizational labor

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[19] The reliance of Petitioner and his *amici* on language from various cases concerning the importance of state power to enforce state criminal laws — which Petitioner acknowledges are "in a different context" (Pet. 26) — is also unavailing. None of these cases, all of which concern federal habeas review or double jeopardy, stands for the proposition that state enforcement of otherwise valid state laws may not be limited by the Supremacy Clause in areas of substantial federal concern. *See Calderon v. Thompson*, 523 U.S. 538 (1998); *McCleskey v. Zant*, 499 U.S. 467 (1991); *see also Heath v. Alabama*, 474 U.S. 82 (1985); *United States v. Wheeler*, 435 U.S. 313 (1978); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

picketing. *See Hotel Employees Union, Local No. 255 v. Sax Enters., Inc.*, 358 U.S. 270, 271 (1959). Thus, prohibiting a state from enforcing its laws against subjects of federal concern, such as national banks, is a conventional application of the supremacy of federal law.

Finally, the argument of the CSBS that the exception to § 484 for visitorial powers "vested in the courts of justice" permits the states to "file suits to enforce their laws" (CSBS Br. 14-17) flies in the face of *Watters*' holding prohibiting the exercise of state "enforcement authority," 127 S. Ct. at 1569. Petitioner implicitly concedes that this argument does not support certiorari by relegating it to a single-sentence footnote (Pet. 29 n.12). As the Second Circuit explained,

> The notion that the exception was intended to permit lawsuits, as opposed to administrative actions, appears particularly misguided since at the time the NBA was enacted, visitorial powers were primarily exercised through the bringing of actions in court. *See, e.g., Guthrie*, 199 U.S. at 157 ("The visitation of civil corporations is by the government itself, through the medium of the courts of justice.")

(Pet. App. 30a-31a.)

IV. THE DECISION OF THE COURT OF APPEALS DOES NOT IMMUNIZE NATIONAL BANKS FROM ENFORCEMENT OF STATE CONSUMER PROTECTION AND FAIR-LENDING LAWS

The Court of Appeals' decision leaves responsibility for enforcement of state consumer protection and fair-lending laws with respect to the exercise of authorized national bank lending powers where Congress intended it to be: with the OCC. Congress has given the OCC broad authority to issue cease and desist orders to national banks for any violation of law, state or federal, 12 U.S.C. § 1818(b), as well as to impose substantial civil money penalties, 12 U.S.C. § 1818(i)(2). When Congress authorized interstate branching by national banks, it subjected the interstate branches to the laws of the "host" state, but expressly provided that such state laws "shall be enforced, with respect to such branch[es], by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B). There was no suggestion that the states should share in the enforcement of these laws.

Because Congress has already made the policy determination that the OCC, not state authorities, should regulate national banks, the arguments of Petitioner and his *amici* that states have a strong interest in enforcing their laws does not support granting the petition. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must

prevail." *de la Cuesta*, 458 U.S. at 153 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

The OCC has specialized expertise and resources that it brings to bear in enforcing fair lending laws, whether the laws are adopted by Congress or the states. Any consideration of whether a national bank has unlawfully discriminated in its mortgage lending requires a comparison between the bank's actual lending decision and the decision that arguably should have been made based on all the factors that must be considered under the standards established and enforced by the OCC.

Petitioner is mistaken in asserting that the OCC does not examine compliance with state law. (*See* Pet. 30-32.) As the report of the U.S. Government Accountability Office ("GAO") cited by Petitioner makes clear, when the OCC identifies state law requirements applicable to national banks, examiners are advised so that they can take the requirements into account in their examinations. GAO, GAO-06-387, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 23 (2006), *available at* http://www.gao.gov/new.items/d06387.pdf. Notably, the conclusion of the GAO report is that the OCC ought further to clarify its position with respect to state consumer protection laws, not that the OCC should withdraw its regulations. *Id.* at 41-45. The OCC has a staff of over 2000 bank examiners who have conducted thousands of fair lending examinations.[20]

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[20] Between 1993 and 1997, for example, the OCC conducted more than 3000 fair lending examinations. Eugene A. Ludwig, (footnote continued)

Additionally, the OCC's Customer Assistance Group handles 70,000 calls a year and "returned nearly $30 million to national bank customers over the last five years."[21]

The OCC usually does not need to bring formal enforcement actions because "recommendations by the [federal bank regulators] concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings." *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963). However, the OCC has initiated numerous public enforcement actions against national banks, and imposed significant monetary sanctions, in connection with violations of laws prohibiting discrimination in lending and unfair and deceptive marketing practices.[22]

(continued)
Comptroller of the Currency, Remarks Before the National Urban League, 1997 WL 847864, at *2 (Aug. 5, 1997).

[21] OCC, *Report of the Ombudsman 2005-2006* 10 (2007), *available at* http://www.occ.treas.gov/Ombudsman/2006OmbudsmanReport.pdf. The OCC recently has entered into Memoranda of Understanding with various state banking departments, including the New York Banking Department, to "provide a mechanism for sharing consumer complaints information." OCC, NR 2006-128, *OCC and New York Banking Department Agree to Share Consumer Complaints* (2006).

[22] *See In re Homeowners Loan Corp.*, OCC Enf. Act. 2005-142 (Nov. 1, 2005); *In re First Nat'l Bank of Marin*, OCC Enf. Act. 2004-45 (May 24, 2004); *In re Clear Lake Nat'l Bank*, OCC Enf. Act. 2003-135 (Nov. 4, 2003); *In re First Cent. Bank, N.A.*, OCC Enf. Act. 99-13 (Feb. 12, 1999); *In re First Nat'l Bank of Vicksburg*, OCC Enf. Act. 94-220 (Jan. 21, 1994); *see also In re Providian Nat'l Bank*, 2000 OCC Enf. Dec. LEXIS 55 (June 28, 2000).

Far from suggesting any need to expand the visitorial authority of state attorneys general, the "recent events" alluded to by Petitioner (Pet. 32) indicate that the state attorneys general should concentrate their resources on the many thousands of state chartered and licensed mortgage brokers, mortgage banks, and commercial banks over which they indisputably have authority. The Chairman of the House Financial Services Committee has concluded that:

> *The more traditional commercial banks, which have been well regulated for years, contributed relatively little to the current crisis.* It is the unregulated sectors of the economy, including non-bank mortgage originators and unregulated dealers in exotic financial instruments like credit default swaps that were largely responsible for the problems.[23]

State attorneys general are, of course, responsible for enforcement of myriad state laws, including specifically enforcement of state laws against a vast number of state-licensed lenders and

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[23] Barney Frank, Chairman, House Comm. on Fin. Servs., Letter to Constituents (Oct. 11, 2008), *available at* http://www.house.gov/frank/economiccrisis101108.html (emphasis added); *see also* President's Working Group on Financial Markets, *Policy Statement on Financial Market Developments* 11 (Mar. 2008) ("limited government oversight of mortgage companies not affiliated with regulated depositories, which made about half of higher priced mortgages in 2006, contributed to a rise in unsound underwriting practices in the subprime sector, including, in some cases, fraudulent and abusive practices.").

brokers. Any effort to extend their enforcement powers to hundreds of national banks would only dilute the enforcement capabilities of state attorneys general where they are most needed.

CONCLUSION

The petition for a writ of certiorari should be denied.

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December 8, 2008

OPPOSITION BRIEF

No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK, PETITIONER

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that measures taken by the New York State Attorney General to enforce state fair lending law against national banks would subject the banks to "visitorial powers" in contravention of 12 U.S.C. 484.

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In the Supreme Court of the United States

No. 08-453

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK, PETITIONER

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 510 F.3d 105. The opinions of the district court (Pet. App. 63a-117a, 118a-142a) are reported at 386 F. Supp. 2d 383 and 393 F. Supp. 2d 620.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2007. A petition for rehearing was denied on June 5, 2008 (Pet. App. 143a-144a). On August 26, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 3, 2008, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Office of the Comptroller of the Currency (OCC), a bureau within the Department of the Treasury, is responsible for administering the National Bank Act (NBA or Act), 12 U.S.C. 21 *et seq.* "As the agency charged by Congress with supervision of the NBA, OCC oversees the operations of national banks and their interactions with customers." *Watters* v. *Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1564 (2007). The OCC's chief officer, the Comptroller of the Currency, is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a. The OCC has authority to enforce national bank compliance with any applicable state or federal law regulating the business of banking. 12 U.S.C. 1818; see *National State Bank* v. *Long*, 630 F.2d 981, 988 (3d Cir. 1980).

Under the NBA, the OCC's supervision of national banks in their banking operations is "largely to the exclusion of other governmental entities, state or federal." *Watters*, 127 S. Ct. at 1564. Specifically, the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress of by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a).[1] As this Court has explained, visitation has been tradition-

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[1] Section 484(b) provides a limited exception for "lawfully authorized State auditors and examiners" to "review [a bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b). That exception is not at issue in this case.

ally understood as "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its law and regulations." *Guthrie* v. *Harkness*, 199 U.S. 148, 158 (1905). "[V]isitation of civil corporations is by the government itself" and was traditionally conducted "through the medium of the courts of justice." *Id.* at 157.

Through notice and comment rulemaking, the OCC has promulgated regulations defining the term "visitorial powers" as it appears in the NBA. 69 Fed. Reg. 1895 (2004). The regulations define "visitorial powers" to include "(i) [e]xamination of a bank; (ii) [i]nspection of a banks's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2). The OCC's regulations also clarify the meaning of the statutory exception permitting the exercise of visitorial powers "vested in the courts of justice." 12 U.S.C. 484(a). The regulations state that the "courts of justice" exception "pertains to the powers inherent in the judiciary," such as the power to issue discovery orders and subpoenas, "and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. 7.4000(b)(2).

2. Various federal laws prohibit discrimination in lending on the basis of race, color, religion, sex, national origin, marital status, age, and other protected grounds. See, *e.g.*, Equal Credit Opportunity Act (ECOA), 15

U.S.C. 1691 *et seq.*; Fair Housing Act (FH Act), 42 U.S.C. 3601 *et seq.* Many States, including New York, have enacted laws that parallel those federal anti-discrimination provisions. New York State Executive Law § 296-a is that State's counterpart to the ECOA. See Pet. App. 3a & n.3; N.Y. Exec. Law. § 296-a(1)(a) (McKinney 2005).

The Home Mortgage Disclosure Act of 1975 (HMDA), 12 U.S.C. 2801 *et seq.*, requires lenders making home improvement loans or loans secured by residential real property to compile and make available to the public specified information about their mortgage lending activities. 12 U.S.C. 2803. Those disclosures include the applicants' race, ethnicity, gender, and income, and, for certain loans, the interest rate charged. *Ibid.* Because HMDA data do not capture all information necessary for prudent underwriting and pricing, HMDA data alone cannot form the basis for a determination about the existence of unlawful lending discrimination. 59 Fed. Reg. 18,270 (1994) (Interagency Policy Statement on Discrimination in Lending); OCC, *Frequently Asked Questions About the New HMDA Data* 5-6 (Apr. 3, 2006) <http://www.occ.treas.gov/ftp/release/2006-44a.pdf>.

Accordingly, more extensive analysis of an institution's lending activities is necessary to determine whether a bank has engaged in unlawful discrimination in lending. The OCC conducts that analysis through a comprehensive system of fair lending risk assessment, fair lending risk screening using sophisticated modeling techniques, and on-site examinations. If the OCC determines that a bank has violated fair lending laws or that the bank's practices are potentially discriminatory, the OCC will order the bank to cease the discriminatory

practices, take such other remedial action as necessary to address harm to individual borrowers, and make referrals to the United States Department of Justice and notifications to the Department of Housing and Urban Development, as appropriate. 15 U.S.C. 1691e(g) and, (k); 59 Fed. Reg. at 18,272-18,274; OCC, *Fair Lending Examination Procedures* 9 (Apr. 2006).

3. In March 2005, four national banks that are members of the Clearing House Association, a financial institution trade association, disclosed HMDA demographic lending data for calendar year 2004. Shortly thereafter, the New York State Attorney General's office sent "letters of inquiry" to the banks or their holding companies. Pet. App. 3a. The letters asserted that the banks' HMDA data indicated racial disparities in the pricing of loans between white borrowers and African-American and Hispanic borrowers. *Ibid.* The letters further stated that the disparities, "unless legally justified[,] may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a." *Ibid.* "In lieu of issuing a formal subpoena," the letters requested certain non-public information concerning the lending activities of the banks and their operating subsidiaries, including data on real estate loans made in New York State. *Id.* at 3a-4a.

4 On June 16, 2005, respondents (the OCC and the Clearing House Association) each filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief against petitioner, the New York State Attorney General. Pet. App. 4a-5a, 66a-67a. Petitioner filed a counterclaim in the OCC action seeking to have the OCC's visitorial powers regulation, 12 C.F.R. 7.4000,

set aside as arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706. See Pet. App. 5a.

On October 12, 2005, the district court entered summary judgment for respondents. The court granted declaratory and injunctive relief barring petitioner from infringing the OCC's exclusive visitorial powers over national banks and their operating subsidiaries. Pet. App. 63a-117a, 118a-142a. The court also denied petitioner's counterclaim challenging the validity of the OCC's regulation. *Id.* at 114a-115a. The court permanently enjoined petitioner from "issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with [his] already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws." *Id.* at 116a-117a.[2]

5. As relevant here, the court of appeals affirmed the district court's judgment. Pet. App. 1a-62a. The court of appeals observed that the parties' dispute centered on "the meaning of the term 'visitorial powers' in § 484(a)," and, in particular, on whether the OCC's interpretation of that term is entitled to deference under the

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[2] In its decision in the suit filed by the Clearing House Association, the district court also enjoined petitioner from instituting any judicial action premised on New York's *parens patriae* authority to enforce the FH Act's fair lending provisions against the Clearing House Association's national bank members or their operating subsidiaries. Pet. App. 141a. The court of appeals subsequently vacated that injunction on ripeness grounds because petitioner had not threatened any action to enforce the FH Act until after the Clearing House Association had commenced its suit. *Id.* at 32a-39a. Petitioner has not sought review of that portion of the court of appeals' decision. Pet. 12 n.3.

principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). Pet. App. 10a. In that regard, the court noted petitioner's concession that, if the OCC's definition of "visitorial powers" and its construction of the "courts of justice" exception were upheld, Section 484(a) would bar petitioner's investigation and threatened enforcement action. See Pet. App. 15a & n.6.

The court of appeals then considered and rejected petitioner's various arguments that *Chevron* deference should not apply. The court first rejected the contention that *Chevron* deference would be inconsistent with the presumption against preemption that governs in areas of regulation traditionally allocated to the States. The court explained that the presumption against preemption does not apply in the context of national bank regulation, which has been "substantially occupied by federal authority for an extended period of time." Pet. App. 12a (quoting *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005), cert. denied, 127 S. Ct. 2093 (2007)). The court also rejected petitioner's contention that *Chevron* deference is inappropriate because the OCC's interpretation invokes the outer limits of Congress's power and therefore triggers the doctrine of constitutional avoidance. *Id.* at 13a-14a. The court concluded that the OCC's interpretation of the term "visitorial powers" casts no doubt on the constitutionality of Section 484 even though it prevents the States from enforcing certain state laws against national banks. The court observed that, because national banks are "creatures of federal statute," the "exercise of 'traditional' state power in the context of national banking regulation is already substantially qualified." *Id.* at 14a. The court also explained that, under this Court's precedents, States

"can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Ibid.* (quoting *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875)).

The court of appeals also rejected petitioner's contention that the OCC had exceeded its rulemaking authority, noting that 12 U.S.C. 93a gives the Comptroller "broad authority" to promulgate regulations implementing the NBA. Pet. App. 24a. And the court rejected petitioner's argument that *Chevron* deference is inappropriate because the regulation at issue here "interprets purely legal concepts, as opposed to technical matters within the OCC's expertise." *Id.* at 25a. The court explained that the OCC is not deprived of *Chevron* deference for its interpretation of terms in the NBA merely because it "attempts to harmonize its rulemaking with judicial precedent." *Id.* at 26a. The court also noted that the OCC's regulation reflects an effort to "accommodat[e] conflicting policies that [a]re committed to it by the [NBA]." *Id.* at 28a.

Applying *Chevron* deference, the court of appeals held that the challenged OCC regulations reflect a reasonable understanding of the statutory term "visitorial powers" and of the "courts of justice" exception. The court concluded that the OCC's interpretation of the term "visitorial powers" is consistent with the definition this Court gave to that term in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905), and is supported by the Court's recent decision in *Watters*, which made clear that "investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision." Pet. App. 20a. The court of appeals also concluded that the OCC has

reasonably interpreted the "courts of justice" exception as involving only "the powers inherent in the judiciary" and as not granting States any authority to "compel compliance by a national bank" with any law concerning "the content or conduct of activities authorized for national banks under Federal law." *Id.* at 30a (quoting 12 C.F.R. 7.4000(b)(2)). The court noted that petitioner's proposed interpretation of the exception, under which States could use lawsuits to accomplish regulation that could not be accomplished administratively, "would swallow the rule" against the States' unauthorized exercise of "visitorial powers." *Ibid.*; see *id.* at 22a-23a.

The court of appeals also observed that the OCC's interpretation of Section 484 "furthers Congress's intent * * * to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federal authorized powers, such as real estate lending." Pet. App. 28a-29a (quoting *Watters*, 127 S. Ct. at 1567). "At the same time," the court noted, the OCC's interpretation "preserves state sovereignty by leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers." *Id.* at 29a. The court of appeals therefore upheld the OCC's interpretation of Section 484 and affirmed the declaratory and injunctive relief sought by the OCC and ordered by the district court. *Id.* at 32a.

Judge Cardamone dissented in relevant part. Pet. App. 42a-62a. He would have held that the OCC's regulatory definition of the term "visitorial powers" is not entitled to *Chevron* deference, and that the challenged regulation is invalid because it impermissibly alters the balance between federal and state authority. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or another court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly upheld the OCC's interpretations of the term "visitorial powers" and the "courts of justice" exception in 12 U.S.C. 484. As the court of appeals concluded (Pet. 10a-32a), the OCC's reasonable interpretations of those ambiguous NBA provisions are entitled to deference under the principles set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984).

This Court recently reaffirmed that, "[w]here an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency's determination." *Long Island Care at Home, LTD* v. *Coke*, 127 S. Ct. 2339, 2350-2351 (2007) (citing *United States* v. *Mead Corp.*, 533 U.S. 218, 229-233 (2001)).[3] The OCC's interpretations of "visitorial powers" and the "courts of justice" exception, as embodied in 12 C.F.R. 7.4000, satisfy each of those criteria. The regulation sets forth the rights of national banks and the

[3] This Court has indicated that notice-and-comment rulemaking is not indispensable to the extension of *Chevron* deference to OCC statutory interpretations. *Mead*, 533 U.S. at 231 & n.13 (citing *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257, 263 (1995)). In any event, as discussed below, the OCC followed full notice-and-comment procedures in promulgating the regulation at issue here.

respective authority of federal and state actors. See 12 C.F.R. 7.4000. In adopting its interpretations, the OCC carefully focused on the issues involved and followed full notice-and-comment procedures, responding to concerns raised by commenters and fully explaining its reasoning. See 69 Fed. Reg. 1895 (2004) (final rule); 68 Fed. Reg. 6363 (2003) (proposed rule). And, as the court of appeals explained (Pet. App. 24a), OCC acted within its broad statutory authority to issue rules and regulations to "carry out the responsibilities of the office." 12 U.S.C. 93a.

The application of *Chevron* deference is further supported by this Court's cases interpreting the NBA, which have repeatedly affirmed that the OCC's "reasonable interpretation" of that Act is entitled to "controlling weight" unless it is contrary to Congress's clearly expressed intent. *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987), and *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-627 (1971)). The Court has made clear that the OCC's interpretation of ambiguous NBA language is entitled to *Chevron* deference even if, as in this case, that interpretation results in preemption of state law. See *Smiley* v. *Citibank*, 517 U.S. 735, 744 (1996) (deferring to the OCC's interpretation of the term "interest" in 12 U.S.C. 85 even though Section 85 preempts state law).

The application of *Chevron* deference in this case is also consistent with the decisions of other courts of appeals, which have deferred to OCC interpretations of NBA provisions even when those interpretations resulted in the preemption of state law. See, *e.g.*, *SPGGC, LLC* v. *Ayotte*, 488 F.3d 525, 531-532 (1st Cir. 2007) (de-

ferring to OCC interpretation that issuance and sale of stored value cards is an "incidental power[] * * * necessary to carry on the business of banking" under 12 U.S.C. 24(Seventh)), cert. denied, 128 S. Ct. 1258 (2008); *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 318 (2d Cir. 2005) (deferring to OCC interpretation that use of an operating subsidiary is an "incidental power"), cert. denied, 127 S. Ct. 2093 (2007); *National City Bank* v. *Turnbaugh*, 463 F.3d 325, 332 (4th Cir. 2006) (same), cert. denied, 127 S. Ct. 2096 (2007); *Wells Fargo Bank* v. *James*, 321 F. 3d 488, 493 (5th Cir. 2003) (deferring to OCC determination that NBA authorizes national banks to charge non-account-holders for cashing checks); *Wachovia Bank, N.A.* v. *Watters*, 431 F.3d 556, 561 (6th Cir. 2005) (deferring to OCC interpretation that use of an operating subsidiary is an "incidental power[]"), aff'd, 127 S. Ct. 1559 (2007); *Wells Fargo Bank, N.A.* v. *Boutris*, 419 F.3d 949, 960 (9th Cir. 2005) (same). Petitioner cites no court of appeals decision holding that deference to the OCC's construction of ambiguous NBA terms is inappropriate, either in general or where acceptance of the OCC's interpretation results in the preemption of state law.

The court of appeals in this case also correctly held that the OCC's interpretations of "visitorial powers" and the "courts of justice" exception are reasonable. Pet. App. 16a-23a, 26a-32a. The OCC has construed the term "visitorial powers" to include a State's demands to review a national bank's "records," as well as state efforts to "[e]nforc[e] compliance with" state laws concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2). As the court of appeals concluded (Pet. App. 16a-17a), the OCC's interpretation is consistent with this Court's observation in

Guthrie v. *Harkness*, 199 U.S. 148, 158 (1905), that visitation has traditionally been understood as "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations."[4]

The OCC's construction is also supported by *Watters*, in which the Court relied on Section 484 and the OCC's visitorial powers regulation in concluding that a State may not confer on a state officer "examination and *enforcement* authority over mortgage lending, or any other banking business done by national banks." *Watters*, 127 S. Ct. at 1569 (emphasis added); see Pet. App. 18a-21a. In addition, the OCC's interpretation furthers Congress's intent in enacting the NBA "[t]o prevent inconsistent or intrusive state regulation from impairing the national [banking] system." *Watters*, 127 S. Ct. at 1566; see Pet. App. 28a-29a. State laws subjecting national banks' lending and other banking activities "to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business." *Id.* at 18a (quoting *Watters*, 127 S. Ct. at 1568).

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[4] Petitioner contends (Pet. 28) that "[t]raditionally, 'visitorial powers' subject a corporation to special supervision by the jurisdiction that granted its corporate charter; they are the powers used to supervise the corporation's use of, and compliance with, its corporate charter." As noted above (note 1, *supra*), however, 12 U.S.C. 484(b) establishes a limited exception to Section 484(a)'s general ban on the unauthorized exercise of "visitorial powers." Section 484(b) provides that "lawfully authorized State auditors and examiners may * * * review [a national bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b). That specific statutory exception, covering a narrow category of state enforcement activities, would be superfluous if petitioner's construction of the term "visitorial powers" were correct.

The OCC has also reasonably interpreted the "courts of justice" exception to encompass only "the powers inherent in the judiciary" and not to grant States any authority to "compel compliance by a national bank" with laws concerning "the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. 7.4000(b)(2). As the court of appeals explained, the contrary interpretation proposed by petitioner, under which the exception would permit lawsuits by States to enforce substantive requirements and prohibitions that the States could not enforce administratively, "would swallow the rule" against unauthorized state exercise of "visitorial powers." Pet. App. 30a; see *id.* at 22a-23a. At the time the NBA was enacted, lawsuits were the primary means by which state officials exercised visitorial powers. *Guthrie*, 199 U.S. at 157. Section 484's prohibition on the exercise of visitorial powers would therefore have been virtually meaningless if the "courts of justice" exception permitted all visitations accomplished through lawsuits. It was therefore entirely reasonable for the OCC to reject that interpretation of the exception.

The OCC regulations at issue here also accord with longstanding precedent interpreting Section 484. Nearly thirty years ago, the Third Circuit held that "visitorial powers" under Section 484 included enforcement of a New Jersey law prohibiting redlining (*i.e.*, geographic discrimination in mortgage lending), and that Section 484 therefore precluded the State from enforcing the law. See *Long*, 630 F.3d at 981. Consistent with that decision, the court below correctly held that current 12 C.F.R. 7.4000 reflects a permissible interpretation of Section 484.

2. Contrary to petitioner's contention (Pet. 15-18), the decision of the court of appeals does not conflict with *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924) (*St. Louis*), or with any other decision of this Court.

St. Louis involved a State's suit against a national bank to enforce a state statute prohibiting banks from operating branches. After concluding that federal law at that time did not authorize national banks to engage in branch banking, *St. Louis*, 263 U.S. at 656-659, this Court held that the State could enforce the state law against the bank, *id.* at 659-660. The decision in *St. Louis* does not conflict with the holding of the court below that Section 7.4000 reasonably interprets Section 484's prohibition on a State's exercise of "visitorial powers" to include state efforts to "[e]nforc[e] compliance" with laws concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2).

The Court in *St. Louis* did not mention, much less construe, either the term "visitorial powers" or the predecessor to Section 484 in effect at the time, Rev. Stat. 5241.[5] And the Court of course had no opportunity to consider Section 7.4000, which was not promulgated until decades later. Moreover, the holding in *St. Louis* is fully consistent with Section 7.4000's interpretation of the term "visitorial powers" because the state law at issue in *St. Louis* concerned branch banking, an activity that was not authorized for national banks at that time. Under those circumstances, the State's suit did not seek

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[5] As petitioner notes (Pet. 16 & n.4), the parties in *St. Louis* had called the Court's attention to Rev. Stat. 5241. For whatever reason, however, the Court chose not to address the provision. The Court's opinion therefore cannot reasonably be viewed as adopting any particular construction of Rev. Stat. 5241.

to "[e]nforc[e] compliance" with a law concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2). Here, in contrast, the state law at issue, insofar as it prohibits discrimination in real estate and other lending, unquestionably concerns an activity authorized by federal banking law—real estate lending, the same activity at issue in *Watters*. See 12 U.S.C. 371; Pet. App. 26; *Watters*, 127 S. Ct. at 1267. Petitioner's argument (Pet. 18) that the banking activity at issue here was unauthorized incorrectly conflates the underlying banking power with the discriminatory manner in which the power was allegedly exercised.

Even if *St. Louis* could somehow be construed as adopting, *sub silentio*, an interpretation of Section 484 that is inconsistent with the OCC's interpretation in Section 7.4000, the current OCC regulations would still be entitled to deference. In *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), this Court held that, under *Chevron*, an agency may adopt a statutory interpretation that differs from the interpretation previously reached by a federal court so long as the judicial construction does not follow "from the unambiguous terms of the statute." *Id.* at 982. "Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-983. Because the Court's opinion in *St. Louis* did not even mention the then-current version of Section 484, *St. Louis* cannot reasonably be read to hold that any particular construction of Section 484 follows "from the unambiguous terms of the statute." *Id.* at 982.

For many of the same reasons, the decision below also does not conflict with the other decisions of this Court on which petitioner relies. See Pet. 16 (citing *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (*Plant City*); *First Nat'l Bank of Bay City* v. *Fellows*, 244 U.S. 416 (1917) (*Bay City*); *Waite* v. *Dowley*, 94 U.S. 527 (1877)). Like *St. Louis*, those decisions do not mention, much less construe, Section 484, its predecessor statutes, or the term "visitorial powers." Nor did the Court, in issuing those decisions, have the opportunity to address Section 7.4000, which did not yet exist. Those cases, moreover, involved circumstances quite different from those presented here. *Waite* involved enforcement of a state law concerning the taxation of bank shareholders, not a law concerning the bank's exercise of its federally authorized banking powers. See *id.* at 532. *Plant City* and *Bay City* involved the enforcement of limits to national banking powers imposed where federal law expressly applied conditions incorporated by reference to state law. See *Plant City*, 396 U.S. at 130; *Bay City*, 244 U.S. at 428. As this Court explained in *Watters*, rulings in cases involving that very different context do not shed light on state authority to regulate the exercise by national banks of powers that are not conditioned upon state permission, such as the real estate lending power at issue here. See 127 S. Ct. at 1569 n.7.

3. Petitioner contends (Pet. 19-25) that this Court's review is warranted because the decision of the court of appeals conflicts with the Tenth Circuit's decision in *Colorado Public Utilities Commission* v. *Harmon*, 951 F.2d 1571 (1991). There is no conflict.

The question presented in *Harmon* was whether regulations issued by the United States Department of

Transportation (DOT) under the Hazardous Material Transportation Uniform Safety Act of 1990 (HMTUSA), 49 U.S.C. App. §§ 1801 *et seq.*, at 146 (Supp. II 1990), preempted certain regulations promulgated by the Colorado Public Utilities Commission. The DOT had issued "advisory, nonbinding opinions" concluding that the Colorado regulations were preempted under 49 U.S.C. App. § 1811(a), at 158 (Supp. II 1990), which provides that a state regulation is preempted if it "creates an obstacle to the accomplishment and execution" of the HMTUSA or federal regulations promulgated thereunder. *Harmon*, 951 F.2d at 1576, 1578. The Tenth Circuit deferred to the "DOT's determinations" in the opinions "that its regulations overlap with Colorado's regulations," but the court "independently review[ed] the legal issue of preemption." *Id.* at 1579.

The decision below is not inconsistent with *Harmon*. The court below deferred to the OCC's interpretation of ambiguous NBA language—the term "visitorial powers" and the phrase "vested in the courts of justice." 12 U.S.C. 484(a); see Pet. App. 16a-21a (discussing the meaning of "visitorial powers"); *id.* at 22a-23a (discussing the meaning of "vested in the courts of justice"). The court did not defer to the OCC's position that its construction of that language would result in the preemption of petitioner's investigation and threatened enforcement action. Indeed, the court had no occasion to defer to the OCC's position on that question because petitioner conceded that his investigation and enforcement efforts would be barred if the court upheld the OCC's interpretation. See *id.* at 15a n.6. In contrast, the Tenth Circuit in *Harmon* did not address whether it should defer to the DOT's interpretation of the substantive meaning of ambiguous statutory terms. Rather, it

addressed whether it should defer to the DOT's legal determination that particular state regulations were preempted. See *Harmon*, 951 F.2d at 1579.

As this Court explained in *Smiley*, those are two very different questions. See 517 U.S. at 744 (distinguishing "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive"). The Court in *Smiley* reserved the question whether courts should defer to an agency's determination that a statute preempts state law, while making clear that courts must defer to an agency's reasonable interpretation of ambiguous statutory terms, even if that deference results in preemption. See *ibid.* The decision below accords with *Smiley* and does not conflict with *Harmon*.[6]

The decision below also does not conflict with *Harmon* for another, independent reason. The court below deferred to an interpretation embodied in a "full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act." *Smiley*, 517 U.S. at 741. In contrast, the Tenth Circuit in *Harmon* declined to defer to DOT views expressed in "advisory, nonbinding opinions." *Harmon*, 951 F.2d at 1578. This Court has indicated that such informal opinions, unlike regulations issued pursuant to notice and comment, generally

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[6] To the extent that *Harmon* provides any indication of how the Tenth Circuit would resolve the deference issue addressed by the court below, that decision suggests that the Tenth Circuit would likewise defer to an agency's interpretation of the substantive meaning of ambiguous statutory provisions. The Tenth Circuit stated that "this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Harmon*, 951 F.2d at 1578-1579.

are not entitled to *Chevron* deference. See *Mead*, 533 U.S. at 227-231.[7]

In any event, this case would be a poor vehicle to address the extent to which agency opinions on preemption are entitled to deference. Such questions generally arise when courts resolve issues of implied conflict preemption, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000), or when they interpret a provision that expressly preempts state law, *e.g.*, *Medtronic* v. *Lohr*, 518 U.S. 470, 496 (1996). This case involves neither of those contexts. It does not involve implied preemption because Section 484 is an "express command." *Watters*, 127 S. Ct. at 1568. At the same time, Section 484 is not an ordinary express preemption provision. Instead, it is an express prohibition (subject to exceptions) of action by *any* government entity, including *federal* entities. This case therefore does not cleanly present the question whether deference is due an agency's interpretation of a provision expressly preempting state law.

4. Petitioner's remaining arguments are also unpersuasive.

a. Contrary to petitioner's contention (Pet. 25-29), the decision below does not produce a "major alteration of the balance of power between the federal and state governments." *Id.* at 25. Instead, it represents a straightforward application of the Supremacy Clause in the context of federally chartered financial institutions.

"Nearly two hundred years ago, in *McCulloch* v. *Maryland*, [17 U.S. 316,] 4 Wheat. 316, 4 L. Ed. 579

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[7] As noted above, the Court has indicated that OCC interpretations of the NBA warrant deference even when they are expressed in opinion letters rather than rulemaking or formal adjudication. See *Mead*, 533 U.S. at 231 n.13. But *Harmon* involved opinions issued by the DOT rather than by the OCC.

(1819), this Court held federal law supreme over state law with respect to national banking." *Watters*, 127 S. Ct. at 1566. "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). The Court has repeatedly recognized that "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters*, 127 S. Ct. 1567 (quoting *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875)). Interpreting Section 484 to preclude state enforcement of laws concerning "activities authorized or permitted pursuant to federal banking law" (12 C.F.R. 7.4000(a)(2)(iii)) therefore does not remotely alter the constitutional balance or otherwise implicate the doctrine of constitutional avoidance.[8]

This case bears no resemblance to the cases on which petitioner relies (Pet. 26-27). Those cases involved federal laws that constrained the States in their performance of core state functions and/or extended federal power into areas that Congress has not traditionally

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[8] Although petitioner contends that the OCC regulation and the court of appeals' decision sustaining that rule effect "a major alteration of the balance of power between the federal and state governments" (Pet. 25), he appears to acknowledge that Congress could constitutionally have preempted the application to national banks of the New York laws that petitioner sought to enforce. Petitioner argues (*ibid.*) that "[p]reventing a State from enforcing its own valid laws is in many ways a more serious incursion on state sovereignty than preempting the operation of a state law altogether." But if New York officials regard OCC enforcement of New York anti-discrimination provisions as uniquely offensive, the State is free to amend its own laws to render them inapplicable to national banks.

regulated. See *Printz* v. *United States*, 521 U.S. 898 (1997) (holding that Congress cannot compel the States to administer a federal program); *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (requiring a clear statement that Congress intended to override a state constitutional provision setting the qualifications for state judges); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) (requiring a clear statement that Congress intended to authorize federal regulation of discharges into isolated intrastate waters). "Regulation of national bank operations," in contrast, clearly "is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. * * * The Tenth Amendment, therefore, is not implicated here." *Watters*, 127 S. Ct. at 1573; see *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003) ("No elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."). Section 484(a) simply provides for unified federal law over the regulation of federal instrumentalities. It neither extends federal regulation beyond traditional areas of federal concern nor precludes state enforcement activities in spheres where the States have historically regulated.

b. Petitioner is also incorrect in asserting (Pet. 30-32) that the decision below effectively immunizes national banks from enforcement of state consumer protection and fair lending laws. Congress has authorized the OCC to compel national banks to comply with all applicable laws, both state and federal. See 12 U.S.C. 1818(b); see *Long*, 630 F.2d at 988. Moreover, as the court of appeals noted, when Congress authorized interstate branching by national banks, it expressly provided

that state consumer protection and fair lending laws "shall be enforced, with respect to such branch[es], by the [OCC]." 12 U.S.C. 36(f)(1)(B). Congress thus had no doubts about the OCC's capacity to enforce those state laws.

The OCC employs more than 2000 bank examiners and has conducted many thousand fair lending examinations. See Eugene A. Ludwig, Comptroller of the Currency, Remarks Before the National Urban League, 1997 WL 847864, at *2 (Aug. 5, 1997). The primary purpose of such examinations is to ensure compliance with federal fair lending laws, which generally afford protections similar to those provided by state laws like the New York law at issue here. Compare 15 U.S.C. 1691 with N.Y. Exec Law 296-a. When the OCC identifies state-law requirements applicable to national banks, however, examiners are advised of those requirements and can take them into account in conducting examinations. GAO, Publ'n No. 06-387, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 23 (2006).

Between 2002 and July 2007, OCC examiners called to the attention of bank management approximately 200 issues relating to fair lending and mortgage data reporting. *Rooting out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. 1st Sess. 110 (2007) (Statement of Calvin R. Hagins, Director for Compliance Policy, OCC). In addition, the OCC has frequently referred possible fair lending violations to the Departments of Justice and of Housing and Urban Development, and several such referrals

have resulted in public enforcement actions. *Id.* at 106-108. The OCC's Customer Assistance Group, which handles consumer complaints against national banks, has also facilitated the recovery by injured customers of tens of millions of dollars. See OCC, *Report of the Ombudsman* 2005-2006, at 10 (Nov. 2007). Petitioner offers no reason to believe that the OCC does not vigorously enforce fair lending laws against national banks.[9]

In any event, petitioner's policy arguments provide no basis for questioning the correctness of the decision below or for granting the petition for a writ of certiorari. As this Court has recognized in the specific context of national-bank regulation, questions concerning the appropriate division of authority between federal and state officials cannot be resolved "by [the Court's] judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, * * * it must give way to the contrary federal policy." *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373, 378-379 (1954).

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[9] Petitioner also implies (Pet. 32) that the OCC's interpretation of Section 484 somehow contributed to the recent problems associated with subprime lending. Petitioner provides no support for that suggestion, which is contrary to congressional findings that the vast majority of subprime lending was conducted by state-regulated nonbank lenders. H.R. Rep. No. 441, 110th Cong., 1st Sess. 36 (2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The court of appeals took the unprecedented step of holding that a State may not enforce its own laws against a national bank, even when those laws are not substantively preempted and do not conflict or interfere with any federal law. The court reached that anomalous result by deferring to an agency's interpretation of a statutory express preemption clause, even though this Court has never afforded *Chevron* deference to an agency's views as to the preemptive effect of a federal statute.

1. Both OCC and Clearing House labor to depict 12 C.F.R. § 7.4000 as "a straightforward application of the Supremacy Clause." OCC Br. 20; *see* CH Br. 30. But the regulation is hardly that. Neither respondent has identified any other area in which States are prohibited from enforcing their own nonpreempted state laws and a federal agency is given exclusive authority over the enforcement of those laws. Clearing House offers four examples to support the claim that this practice is routine (CH Br. 29-30), but none is apposite. Clearing House has identified examples of state laws which are unenforceable altogether (against international diplomats, or Indians, or where substantively preempted), not examples of state laws made enforceable exclusively by federal agents.

Nor is this anomaly resolved by OCC's observation that the State could amend its law to make the substantive prescriptions inapplicable to national banks. OCC Br. 21 n.8. That observation is a tacit acknowledgment of the unusual character of this preemption regime, and an indication that OCC would welcome the opportunity to transform enforcement

preemption into full-fledged substantive preemption, which all parties agree does not apply to New York's anti-discrimination law. The flaw in the regime embodied in §7.4000 is that it requires the State to rely on OCC for enforcement of state anti-discrimination laws against national banks, and denies the State the ability to make that enforcement a priority. It is no cure to say that the State may abandon entirely its interest in prohibiting discrimination by national banks.

2. Respondents are mistaken in suggesting that the court of appeals' decision merely "endors[ed] a 140-year-old limitation on the States' authority over national banks." CH Br. 26; *see* OCC Br. 20-21. The regulation at issue here, interpreting 12 U.S.C. § 484(a) to preempt state enforcement of valid nonpreempted state law, breaks with a long line of congressional enactments, judicial precedents, and OCC's own prior statutory interpretations.

Before 1966 OCC possessed no authority to enforce state laws, as Clearing House acknowledges (CH Br. 5, 14 n.10). Such laws, where not substantively preempted, must have been enforceable by the States. Only in 1966 did Congress vest OCC, along with the other federal financial institutions regulators, with authority to bring administrative proceedings for violations of state law. *See* Financial Institutions Supervisory Act of 1966, Pub L. No. 89-695, tit. 2, 80 Stat. 1028, 1046-55 .

Section § 484 was not substantively amended, in any relevant respect, in 1966 or at any other time (*see* CH Br. 3). It would fly in the face of both the text and the purpose of the 1966 legislation to find that it

implicitly amended § 484 to preempt state authority to enforce state law, given that Congress in 1966 did not "wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system." S. Rep. No. 89-1482, at 3538 (1966). Indeed, until 2004 OCC maintained that state officials could bring lawsuits to enforce nonpreempted state laws against national banks, confirming that the 1966 amendment did not expand § 484 to preempt that enforcement authority. *See* Brief of OCC at 39 n.20, *OCC v. Spitzer*, No. 05-6001(cv) (2d Cir. May 30, 2006).

Furthermore, States historically have enforced state laws against national banks, as evidenced by this Court's decision in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) ("*St. Louis*") and other decisions of the federal and state courts, cited at Pet. 15-18 . In *St. Louis*, this Court held that the Missouri Attorney General could sue a national bank in state court to restrain a violation of a Missouri anti-branching law, rejecting the arguments of the bank and the United States that such a suit was a prohibited exercise of visitorial powers.[1]

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1. While *St. Louis* does not expressly discuss the predecessor statute to § 484 (Revised Statutes § 5241), the national bank and the United States both argued in that case that the statute barred Missouri's suit. The Court cannot have been unaware of the relevance of that statute; as the dissenting judge below observed (App. 58a), "[i]t is no coincidence" that the Court's analysis in *St. Louis* tracks the definition of "visitorial powers" provided by *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905).

Respondents attempt to distinguish *St. Louis* on the ground that petitioner here seeks to enforce a state law against national banks operating within the scope of their federally authorized banking powers, while *St. Louis* involved state enforcement against a national bank operating outside the scope of those powers, stating that national banks did not have the power to engage in branch banking at the time. OCC Br. 15-16; CH Br. 12-13.[2]

But nothing in *St. Louis* suggests that this proposed distinction is relevant to a State's power to enforce its own nonpreempted law against a national bank. The Court in *St. Louis* first asked whether the Missouri anti-branching statute was preempted by federal law, under principles of conflict preemption. 263 U.S. at 656-59. It considered whether the state law would frustrate the purpose for which the bank was created, interfere with its operations, or impair its efficiency. *Id.* at 659. Finding that Missouri's anti-branching law was not preempted, the Court held that the state attorney general's ability to enforce the law through judicial proceedings necessarily followed. *Id.* at 660.[3]

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2. As a matter of fact, certain national banks did have limited power to operate branches at the time of *St. Louis*, as the opinion itself makes clear. *See* 263 U.S. at 657-58.

3. Nor is this case different from the cases Clearing House seeks to distinguish on the ground that they involved "generally applicable laws that 'do not directly concern a banking practice' and as to which OCC therefore 'has no direct responsibility for

(Cont'd)

The fact that federal law generally did not authorize branch banking was relevant in *St. Louis* only as evidence that the state law could not possibly interfere with federal law and therefore was not preempted. But as New York's anti-discrimination law is also indisputably not preempted, there is no meaningful distinction between the cases. Under the reasoning of *St. Louis*, the Attorney General is not prohibited from suing national banks to enforce New York's nonpreempted anti-discrimination laws.

(Cont'd)

enforcing.'" CH Br. 21 n.15 (quoting *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001)). Like the anti-telemarketing and consumer fraud laws applied to banking practices in *Fleet Mortgage*, New York's anti-discrimination laws state generally applicable prohibitions that apply to the extension of credit, as well as employment, public accommodations, public housing, education, and other activities. *See* N.Y. Exec. Law §§ 296, 296-a. Moreover, 12 C.F.R. § 7.4000's effect is not limited to laws that "directly concern a banking practice," but instead broadly excludes States from any enforcement of state laws "with respect to the . . . conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(a)(3). The authorized activities of national banks are extremely far-ranging and include, for example, providing Medicaid counseling and operating roadside assistance programs. *See* Comptroller of the Currency: Activities Permissible for a National Bank (2007), at 5, 16, *available at* http://www.occ. treas.gov/corpapps/BankAct.pdf (last visited Dec. 18, 2008). Indeed, in the court of appeals OCC asserted a very broad enforcement preemption, conceding only that under its regulation States could still engage in "environmental and building code enforcement." Brief of OCC at 24, *OCC v. Spitzer*, No. 05-6001 (2d Cir. May 30, 2006).

For the same reason, there is no merit to respondents' efforts to distinguish *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), *First National Bank of Plant City v. Dickinson*, 396 U.S. 122 (1969), and other federal decisions permitting suits against national banks by state officials on the ground that in those cases, "federal law expressly applied conditions incorporated by reference to state law." OCC Br. at 17; CH Br. at 14-15. When federal law incorporates state law, there can be no claim that state law is substantively preempted. But incorporation is not otherwise relevant to the question whether the State may enforce its own nonpreempted law. As New York's law also is not preempted, the above cases squarely apply here.

3. Clearing House is mistaken in asserting that petitioner is asking this Court to "re-examine" its recent holding in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1582-84 (2007). CH Br. at 1. *Watters* has no relevance to this case. *Watters* held that state officials are prohibited from exercising visitorial powers over operating subsidiaries of national banks to the same extent that they are prohibited from exercising such powers as to the parent national bank. The parties did not present, and the Court did not decide, any question regarding the scope of those "visitorial powers" or of the statutory exception for such powers "vested in the courts of justice."

While Clearing House correctly observes (CH Br. 25-26) that *Watters* refers to 12 C.F.R. § 7.4000 in discussing the phrase "visitorial powers," the mere reference to § 7.4000 is not equivalent to a finding that the regulation is entitled to *Chevron* deference, which is the core issue here. Indeed, *Watters* specifically

disclaimed any reliance on *Chevron* deference. 127 S. Ct. at 1572 n.13. Here, by contrast, OCC asserts that the key statutory terms are ambiguous, and that *Chevron* deference to 12 C.F.R. § 7.4000 is essential to sustaining its position. OCC Br. 10.

Even if *Watters* had decided a question concerning the meaning of "visitorial powers," which it did not, that case concerned powers very different from those at issue here. At issue in *Watters* was the State's assertion of administrative authority over the bank, including the authority to license and conduct examinations of the regulated entity, which are classic visitorial powers. *See, e.g., Guthrie*, 199 U.S. at 158 ("visitorial powers" denote a supervisory authority "to examine into [a corporation's] manner [of] conducting business, and enforce an observance of [the corporation's] laws and regulations").[4] Thus, to the extent that statements in *Watters* describe "enforcement" as an exercise of visitorial powers, those statements refer to *administrative* enforcement proceedings. *Watters* says nothing about the ability of state attorneys general to bring judicial proceedings against national banks to

4. Contrary to OCC's contention (OCC Br. 13 n.4), 12 U.S.C. § 484(b) fully supports petitioner's position. Section 484(b) authorizes "State auditors and examiners" to "review [bank] records" to ensure compliance with unclaimed property or escheat laws notwithstanding § 484(a). Petitioner has consistently identified the supervisory bank examination as the paradigm of a visitorial power. Section 484(b) merely makes clear that certain on-site inspections by state administrators, which otherwise might be thought to be prohibited banking examinations, are permissible where state administrators are enforcing unclaimed property or escheat laws.

enforce nonpreempted state laws. The decision does not mention *St. Louis* or *Fellows*, let alone overrule those cases.

For similar reasons, respondents ' reliance on *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980) (OCC Br. 14; CH Br. 1, 20-21) is misplaced. *Long* held that § 484 prohibited administrative enforcement of state anti-redlining laws by a state banking commissioner; the decision did not address judicial enforcement. Likely for this reason, *Long*, like *Watters*, did not acknowledge or discuss *St. Louis*, *Fellows*, or the many other federal and state decisions permitting state officials to sue national banks to enforce nonpreempted state laws.

4. Respondents argue (OCC Br. 16; CH Br. 12) that OCC's promulgation of § 7.4000 supersedes *St. Louis*, citing this Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). But this argument simply demonstrates why the decision below warrants this Court's review. Pet. 19-25. *Brand X* depends on the application of *Chevron* deference, which here raises the important and unresolved questions whether, and in what circumstances, such deference applies to a regulation like 12 C.F.R. § 7.4000 that purports to declares the preemptive scope of a federal statute. As we have explained (Pet. 19-25), these legal issues warrant this Court's review.

OCC asserts (OCC Br. 20) that this case is a poor vehicle for resolving these questions because § 484 is not an "ordinary express preemption provision," given

that it restricts both federal and state actors. OCC provides no reason why this distinction is relevant, and it is not. Even if § 484 has incidental effects on the relationship among federal regulatory agencies, the statute is principally directed at the preemption of state law, as Clearing House acknowledges (CH Br. 2-3). And OCC's regulation is expressly aimed at the States, declaring that "[s]tate officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law." 12 C.F.R. § 7.4000(a). The regulation therefore squarely implicates the concerns about federalism and institutional competence that have led members of this Court and other federal courts to question whether and when *Chevron* deference should be afforded to an administrative declaration of a statute's preemptive scope.

Respondents claim this Court has already decided that *Chevron* deference is appropriate for OCC regulations interpreting the NBA, but they incorrectly equate 12 C.F.R. § 7.4000 with other OCC actions to which this Court has extended *Chevron* deference. OCC Br. 11; CH Br. 21-22. The cases they cite involve OCC interpretations that regulate the primary conduct of national banks, not the enforcement authority of States. In *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 (1995), for example, this Court deferred to OCC's interpretive ruling that the brokerage of annuities was an activity "incidental" to the "business of banking" under 12 U.S.C. § 24 (Seventh). Similarly, in *Smiley v. Citibank*

(South Dakota), N.A., 517 U.S. 735, 737, 743-44 (1996), the Court deferred to an OCC regulation providing that late-payment fees qualify as "interest" governed by 12 U.S.C. § 85, which authorizes national banks to change interest at a defined rate. Both cases involve OCC determinations that govern the primary conduct of national banks, unlike the regulation at issue here, which governs whether state officials may enforce state laws against such banks.

Respondents misstate the nature of the distinction drawn in *Smiley* between a statute's "substantive meaning," for which this Court has frequently deferred to agency constructions, and a statute's "preemptive meaning," for which this Court has never extended *Chevron* deference to agency views. Contrary to respondents' suggestions (OCC Br. 19; CH Br. 18-19), a regulation does not pertain to a statute's substantive meaning merely because it construes ambiguous statutory language. If that were so, it would be clear that an administrative construction of an express preemption clause is entitled to *Chevron* deference, whereas several members of this Court have specifically rejected that view, and none has expressly endorsed it. *See Watters*, 127 S. Ct. at 1582-84 (dissenting opinion of Stevens, J., joined by Roberts, C.J., and Scalia, J.); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 512 (1996) (O'Connor, J., concurring in part and dissenting in part).

The substantive meaning of a statute, as explained in *Smiley*, is the meaning of a statute insofar as it regulates primary conduct. Preemptive meaning, by contrast, refers to a statute's preemptive effect on state

law. An express preemptive clause, like 12 U.S.C. § 484, has only preemptive meaning. Accordingly, 12 C.F.R. § 7.4000, which construes § 484, does not warrant *Chevron* deference.

5. Respondents claim there is no genuine circuit split on the question whether *Chevron* deference applies to administrative preemption determinations, OCC Br. 17-20; CH Br. 16-20, but they are mistaken. The District of Columbia Circuit recently noted the uncertainty on precisely this point. *Albany Eng'g Corp. v. FERC*, __ F.3d __, No. 07-1162, 2008 U.S. App. LEXIS 24724, *6-7 (Nov. 28, 2008). Respondents seek to minimize the significance of *Colorado Public Utilities Commission v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991) – which categorically refused to extend *Chevron* deference to an agency determination of preemption – by providing an alternative rationale for that decision, but their effort is both anachronistic and unpersuasive. While OCC observes that today deference might be denied on the ground that deference is generally not afforded to agency positions that are not the product of notice-and-comment rulemaking (OCC Br. 19-20; *see also* CH Br. 17), it is beyond dispute that the Tenth Circuit in fact denied deference in *Harmon* on the ground that the agency's opinion addressed preemption of state law.

Not only is there a split, but OCC overstates the number of circuits on its side of that split. OCC Br. 11-12. Most of the cases cited by OCC are from the line of circuit court decisions leading up to this Court's decision in *Watters*, and their continuing vitality is called into question by this Court's refusal in *Watters* to endorse

the courts of appeals' application of *Chevron* deference to an OCC regulation. The other two – *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 531-32 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1258 (2008), and *Wells Fargo Bank of Texas, N.A. v. James*, 321 F.3d 488, 492 (5th Cir. 2003) – like *Smiley* involve regulations that do not purport to declare the preemptive scope of the NBA.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-453

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of Central New York Citizens in Action, Inc., Empire Justice Center, Lawyers' Committee for Civil Rights Under Law, Long Island Housing Services, Inc., National Community Reinvestment Coalition, National Fair Housing Alliance, Neighborhood Economic Development Advocacy Project, Progressive Research & Action Center, Inc., Public Citizen, Inc., South Brooklyn Legal Services, U.S. PIRGs: Federation of State PIRGs, and Washington Lawyers' Committee for Civil Rights and Urban Affairs as *Amici Curiae* in Support of Petitioner

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INTEREST OF *AMICI CURIAE*

Amici are consumer rights and civil rights groups committed to the effective enforcement of antidiscrimination and consumer protection laws. More details about the individual *amici* are included in the Appendix.[1]

SUMMARY OF ARGUMENT

This case presents issues of enormous legal and social importance warranting this Court's review. From the beginning, this Court has emphasized that national banks are subject to regulation by the states in which they do business. Congress, too, has repeatedly recognized the important role states play in protecting the interests of their consumers and communities.

Recognizing this central role for state law makes sense. States are ideally positioned to respond quickly and effectively to the particular needs facing local communities, and state legislation has long proved a powerful tool for vindicating consumers' rights. Prior to the promulgation of the rule at issue

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[1] Pursuant to Supreme Court Rule 37.2, *amici* provided timely notice of their intent to file this brief to counsel of record for both petitioner and respondents. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Letters reflecting the consent of the parties have been filed with the Clerk.

in this case, state agencies had brought numerous enforcement actions against national banks for violations of state law, resulting in a number of landmark victories.

The 2004 decision by the Office of the Comptroller of the Currency to displace states' longstanding enforcement power with respect to state consumer protection and antidiscrimination laws severely disrupts states' traditional law enforcement regimes. It directly contravenes this Court's precedents and turns a fundamental principle of federalism on its head. The notion that valid and binding *state* laws may be enforced only by the *national* government is both perplexing and contrary to principles of federalism embedded within the Constitution. Moreover, this arrangement thwarts the political accountability upon which democratic government depends.

Full enforcement of the laws at issue in this case is particularly important today. Predatory and discriminatory lending pose a serious threat to consumers. In recent years, predatory lending in the mortgage market, much of it by national banks, has contributed to a surge in foreclosures across the country, with devastating consequences for both individual borrowers and their communities. Discrimination in the lending market also remains a serious concern, with minority borrowers denied equal access to credit at reasonable terms.

The OCC's displacement of state enforcement authority has already undermined, and will continue to undermine, effective enforcement of these critical state laws. In contrast to state agencies, the OCC lacks the mission, expertise, or structure to enforce

these laws vigorously. This Court should grant review to restore states to their traditional role as enforcers of their own applicable consumer protection laws.

REASONS FOR GRANTING THE WRIT

This case warrants the Court's attention because it raises issues of tremendous importance and because the decision below unsettles traditional law enforcement practice throughout the United States.

I. Predatory And Discriminatory Lending Pose A Serious Problem In Many States.

1. The financial industry offers a dizzying array of consumer products, creating a serious risk that vulnerable and financially unsophisticated borrowers will be exploited. Predatory loans are one such dangerous product. These loans typically involve exorbitantly high interest rates, excessive or hidden fees, or penalties for prepayment that trap borrowers in high-cost loans. U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 18-19 (2004) (hereinafter GAO, COMBATING PREDATORY LENDING). Predatory lenders often lure in borrowers with low teaser rates that eventually skyrocket. Gretchen Morgenson, *Beware of Exploding Mortgages*, N.Y. TIMES, June 10, 2007, at 31. Indeed, in some cases the monthly loan payments ultimately exceed the borrower's total monthly income, thus forcing the borrower into default. GAO, COMBATING PREDATORY LENDING 19; TREASURY TASK FORCE ON PREDATORY LENDING, U.S. DEP'T OF HOUS. & URBAN DEV., CURBING PREDATORY

HOME MORTGAGE LENDING 22 (2000) (hereinafter HUD-TREASURY REP.).[2]

A key player in predatory lending is the banking and mortgage industry. The "overwhelming majority" of predatory loans involve subprime mortgages, those to "borrowers who have poor or no credit histories or limited incomes, and thus cannot meet the credit standards for obtaining loans in the prime market." GAO, COMBATING PREDATORY LENDING 21; *see* HUD-TREASURY REP. 17-18. Subprime lenders "may use aggressive sales and marketing tactics to convince consumers who need cash to enter into a home equity loan with highly disadvantageous terms." GAO, COMBATING PREDATORY LENDING 22. Subprime lending has thus "encouraged people to get into financially precarious positions, often precisely at the time when they [are] least able to afford it." Mark Whitehouse, *"Subprime" Aftermath: Losing the Family Home*, WALL ST. J., May 30, 2007, at A1.

Predatory lending is a particularly serious problem among vulnerable populations, especially minorities, the elderly, the poorly educated, and those with low incomes. *See* HUD-TREASURY REP. 22-23, 71-72; Dan Immergluck, *From the Subprime to the Exotic*, 74 J. AM. PLAN. ASS'N 1, 1, 3 (2008). Predatory loans have likewise had a particularly severe impact on low-income immigrants, especially

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[2] For a more extensive discussion of common predatory lending practices, see DAN IMMERGLUCK, CREDIT TO THE COMMUNITY: COMMUNITY REINVESTMENT AND FAIR LENDING POLICY IN THE UNITED STATES 122-24 & tbl.5.5 (2004).

those with limited command of English. Jonathan Karp & Miriam Jordan, *House of Cards: How the Subprime Mess Hit Poor Immigrant Groups*, WALL ST. J., Dec. 6, 2007, at A1.

2. In addition to problems with predatory lending, the lending market also has a long history of invidious discrimination against racial minorities. For much of the twentieth century, many banks "redlined" minority neighborhoods, denying residents any access to credit. *See* IMMERGLUCK, *supra*, at 87-92. Even when loans have been available, however, black and Latino borrowers are significantly more likely to receive higher-rate subprime loans than similarly situated white borrowers, even after controlling for typical measures of creditworthiness such as income and location. *See, e.g.*, Debbie Gruenstein Bocian et al., *Race, Ethnicity, and Subprime Home Loan Pricing*, 60 J. ECON. & BUS. 110, 110-11, 121, 123 (2008);[3] U.S. DEP'T OF HOUS. & URBAN DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA (2000). The lack of equal access to credit at reasonable terms remains a substantial problem today. *See* Jennifer 8. Lee, *Study Notes Fewer Loans to Hispanics and Blacks*, N.Y. TIMES, Oct. 28, 2008, at A26; IMMERGLUCK, *supra*, at 103-08.

3. Not only does predatory lending have tragic consequences for individual borrowers, it also can have devastating consequences for entire

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[3] The Bocian study is based on the same Home Mortgage Disclosure Act data that led the New York Attorney General to open the investigation that led to this case. *Cf.* Pet. App. 3a.

communities. One major consequence of default in predatory mortgage loans is that borrowers lose their homes through foreclosure. Foreclosed homes often end up vacant or abandoned, causing a significant decline in home values throughout local neighborhoods. *See generally* KAI-YAN LEE, FED. RESERVE BANK OF BOSTON, FORECLOSURE'S PRICE-DEPRESSING SPILLOVER EFFECTS ON LOCAL PROPERTIES: A LITERATURE REVIEW (2008). Such a decline makes it harder for neighbors to refinance and to keep their properties. Thus, "higher numbers of foreclosures and stalling or declining home values can become mutually reinforcing trends." Immergluck, *supra*, at 12. Foreclosures also impose significant costs on public agencies, discourage investment in local businesses, and erode the local tax base. *See generally* WILLIAM C. APGAR & MARK DUDA, HOMEOWNERSHIP PRES. FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM (2005).

4. The effects of predatory lending go beyond the fiscal. For example, higher foreclosure levels lead to significantly higher levels of violent crime. *See, e.g.*, Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUSING STUD. 851 (2006); John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFFS. 301, 306-07 & tbl.4 (2000). Children in families forced to leave their homes are separated from their schools and friends, and the absence of stable housing has a detrimental effect on child health. *See* PHILLIP LOVELL & JULIA ISAACS, FIRST FOCUS, THE IMPACT OF THE MORTGAGE CRISIS ON CHILDREN AND

THEIR EDUCATION 1 (2008); *cf.* Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003 (2002). Predatory loans have also taken a severe mental and emotional toll on an increasing number of borrowers. *See* Kelli Kennedy, *Suicides From Financial Crisis Cause Concern*, ASSOCIATED PRESS, Oct. 14, 2008, *available at* http://www.boston.com/news/nation/articles/2008/10/14/suicides_from_financial_crisis_cause_concern/.

5. The surge in foreclosures from predatory lending plays a significant role in the current financial crisis. The development of a secondary market for subprime, often predatory, loans in the mid-1990s made it possible for unscrupulous lenders to issue vast numbers of unsustainable loans while shifting the risk of default onto unsuspecting third parties. GAO, COMBATING PREDATORY LENDING 72, 76. Securitization "weakened the link between the lender and the borrower," creating a pernicious incentive for predatory lending activity and thereby exacerbating the problem. Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown*, WALL ST. J., Mar. 22, 2007, at A1.

Market forces alone have been insufficient to weed out these practices. As former Federal Reserve chairman Alan Greenspan recently explained, federal regulators have long "put too much faith in the self-correcting power of free markets" to effectively police the lending markets. Edmund L. Andrews, *Greenspan Concedes Flaws In Deregulatory Approach*, N.Y. TIMES, Oct. 24, 2008, at B1.

II. State Laws Provide A Critical Bulwark Against Predatory And Discriminatory Lending.

In light of the significant social and personal costs that discrimination, loan defaults, and foreclosures exact, state policymakers have a substantial interest in combating predatory lending. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUS. POL'Y DEBATE 57, 75 (2006). For nearly a century, states have quite properly responded by enacting and enforcing antidiscrimination and fair lending laws like those at issue in this case. While states learn from and cooperate with one another in protecting consumers, they can also tailor legislation to handle distinctive problems that arise in different jurisdictions.

A. State Legislation Has Long Responded To Predatory And Discriminatory Lending.

For nearly a century, states have taken the lead in enacting consumer protection and antidiscrimination statutes. *See, e.g.*, WIS. STAT. § 100.18 (1913) (consumer protection); CONN. GEN. STAT. § 36a-737 (1958) (discrimination in mortgages); GA. CODE. ANN. § 7-6-1 (1975) (discrimination in banking). As Massachusetts Commissioner of Banks Steven Antonakes testified: "Nearly every consumer protection regulation that exists at the federal level, or that Congress is currently contemplating, has its roots at the state level." *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 128

(2007) (Testimony of Steven Antonakes at 6) (hereinafter Antonakes Testimony), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/htantonakes032707.pdf

States continue to perform that critical role today. In particular, over the last decade, "many states and localities have passed laws designed to address abusive mortgage lending by restricting the terms or provisions of certain loans . . . . and have undertaken enforcement activities under existing consumer protection laws and regulations to combat abusive lending." GAO, COMBATING PREDATORY LENDING 58. As of 2004, "25 states and the District of Colombia had passed laws that were specifically designed to address abusive lending practices." *Id.* at 59. By 2007, at least forty states, counties, and municipalities had done so. Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More than They Can Chew?*, 56 AM. U. L. REV. 515, 516 n.3 (2007) (listing predatory lending statutes).[4]

States have shown considerable flexibility and resourcefulness in refining their laws to respond to emerging problems. In 1999, for example, legislators in North Carolina — a major banking state — enacted a law curtailing predatory lending. That law reflected "a consensus of banks, mortgage bankers

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[4] Fair lending laws are laws of general applicability applying to a wide range of lenders doing business within the state; they do not single out national banks for special treatment.

and brokers, nonprofit organizations, and other stakeholders" to address "lending abuses that were not prohibited by federal statutes and regulations." GAO, COMBATING PREDATORY LENDING 63; *see* 1999 N.C. Sess. Laws 332. And when predatory practices continued after the law's enactment, the state responded quickly, amending the statute to increase its efficacy. *See* 2001 N.C. Sess. Laws 393. The GAO found that the 2001 amendments succeeded "in reducing the number of abusive brokers and individual loan originators." GAO, COMBATING PREDATORY LENDING 65; *see also* IMMERGLUCK, *supra*, at 234 ("[D]etailed studies suggest that the laws[] are having the intended consequences of decreasing the prevalence of predatory practices and shifting market share to more responsible lenders."). Thus, by creating and revising lending laws, states play a pivotal role in preventing predation and discrimination in the lending markets.

B. State Enforcement Has Been An Effective And Powerful Tool.

1. State agencies have been markedly effective in enforcing state lending laws. For instance, in 2001, the North Carolina Attorney General's office obtained a $20 million predatory lending settlement against Citigroup. *See* Peterson, *supra*, at 522 & n.29. Similarly, "in 2002[,] a settlement of up to $484 million with Household Finance Corporation resulted from a joint investigation begun by the attorneys general and financial regulatory agencies of 19 states and the District of Columbia." GAO, COMBATING PREDATORY LENDING 62-63. These cases are only examples. One congressional survey found that in

2003, state agencies, after conducting initial investigations, initiated over four thousand enforcement actions "in the area of abusive mortgage lending practices alone." STAFF OF H. COMM. ON FIN. SERVS., 108TH CONG., VIEWS AND ESTIMATES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005, at 16 (Comm. Print 2004). And in 2006, states initiated nearly 3700 enforcement actions against mortgage brokers and lenders. Antonakes Testimony at 13.

The landmark predatory lending settlement against Providian National Bank illustrates the critical role that states play in enforcing their lending laws even when the OCC is involved.[5] The San Francisco District Attorney began investigating Providian after receiving numerous customer complaints. Eventually the OCC supplemented the state's enforcement action with administrative proceedings, working concurrently with the state.[6]

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[5] For a full account of the Providian settlement, *see* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 AM. REV. BANKING & FIN. L. 225, 316 & n.357 (2004).

[6] The former general counsel of Citigroup described the situation more colorfully: "A California state prosecutor . . . embarrassed the OCC into taking action against Providian [National] Bank for telemarketing and pricing practices that bordered on the criminal. . . . For a decade Providian had been well known in the [credit] card industry as the poster child of abusive consumer practices, but apparently not to the OCC." Duncan A. MacDonald, Letter to the Editor, *Comptroller Has*

See Patrick McGeehan, *Soaring Interest is Compounding Credit Card Woes for Millions*, N.Y. TIMES, Nov. 21, 2004, at 1 (describing how the "two agencies joined forces"); Nicholas Kulish, *Providian to Pay at Least $300 Million To Settle Allegations on Card Operations*, WALL ST. J., June 29, 2000, at B12 (describing the "joint investigation"). The OCC's 2004 rule would have foreclosed the state action that led to this landmark consumer victory.

2. State agency enforcement has been a necessary and vital tool for vindicating consumers' rights when national banks have transgressed state law. For instance, in the typical credit fraud case where lenders engage in misleading advertising or direct misrepresentations to potential credit cardholders, state attorneys general have frequently turned to litigation to enforce state consumer protection laws. *See, e.g.*, *State ex Rel. Woods v. Sgrillo*, 859 P.2d 771 (Ariz. Ct. App. 1993) (enforcing state Consumer Fraud Act).

Similarly, state agencies have brought actions against national banks under a variety of other state laws. *See, e.g.*, *SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007) (Connecticut Gift Card Act); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E. 2d 516 (W. Va. 1995) (Consumer Credit and Protection Act); *Att'y Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981) (Michigan Consumer Protection Act).

Duty to Clean Up Card Pricing Mess, AM. BANKER, Nov. 21, 2003, at 17.

States often work cooperatively to enforce their laws. In March 2002 and January 2003, for example, "national banks entered an agreement with 29 states in connection with judicial proceedings brought *by the states* concerning telemarketing practices and the disclosure of cardholder information to third parties." U.S. GOV'T ACCOUNTABILITY OFFICE, OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION LAWS TO NATIONAL BANKS 17 (2006) (emphasis added) (hereinafter GAO, OCC RULES AND STATE LAWS).

3. The 2004 rule disrupted states' traditional enforcement regimes, creating unprecedented challenges and roadblocks to the enforcement of state laws that the OCC acknowledges continue to apply to national banks. In 2006, the GAO surveyed state officials regarding the effects of the new rule and found evidence that it had "limited the actions states can take to resolve consumer issues and negatively affected the way national banks respond to consumer complaints and inquiries from state official." GAO, OCC RULES AND STATE LAWS 17. The GAO further found that "some national banks . . . became less responsive to actions by state officials to resolve consumer complaints" and "declined to submit to state examinations or relinquished their state licenses." *Id.*; *see also id.* at 21 (noting that the 2004 rules "have in effect precluded the state from obtaining information from national banks that could assist the state in protecting consumers" as they had in the telemarketing case discussed above).

The OCC's rulemaking has changed the consumer protection landscape, putting consumers at tremendous risk.[7] Before, states could take effective legal action to penalize violations of state law or to obtain remedial settlements. Now, however, the 2004 rules empower banks to disregard state law and seek injunctions against state enforcement, as occurred in this case. *See also, e.g.*, *Nat'l City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805 (D. Md. 2005) (enjoining enforcement of Maryland law).[8]

III. Exclusive Enforcement Of State Laws By The OCC Threatens To Undermine Principles Of Federalism And Effective Enforcement Of State Law.

A. This Court And Congress Have Long Recognized The Centrality Of State Law In Regulating Banks.

1. This Court has long recognized the importance of state law in the regulation of national banks. Shortly after the first national banks were

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[7] In addition to risk, exclusive enforcement by the OCC may hinder recovery in the lending markets. Investors' ability to rely on state regulators to maintain the integrity of the lending markets would significantly bolster investor confidence and contribute significantly toward unfreezing the credit markets.

[8] Like *Turnbaugh*, this case demonstrates the need to resolve the dispute over the OCC's 2004 rule now. Given the scope and importance of the rule, and potentially needless and contentious litigation costs, no one benefits from letting this issue percolate in the lower courts.

chartered in 1864, the Court made clear that federal banks "are subject to laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869).

Since *National Bank*, this Court has consistently adhered to this principle. In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924) ("*St. Louis*"), for example, the Court allowed Missouri to enforce one of its statutes against a national bank, reiterating that "national banks are subject to the laws of a state in respect of their affairs, unless such laws . . . conflict with the paramount law of the United States." *Id.* at 656. Similarly, in *Anderson National Bank v. Luckett*, 321 U.S. 233, 248 (1944), the Court held that Kentucky's attempt to enforce a generally applicable state statute regulating abandoned deposits fell within the state's police power. *See also Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (affirming a state's enforcement of state law and listing cases in which this Court "found numerous state laws applicable to federally chartered banks").

2. This Court recognizes that states have a sovereign right to enforce their own laws. To be sure, Congress clearly could preempt such statutes. But when it comes to the kinds of consumer protection and antidiscrimination laws at issue here, Congress has not done so.

Thus, the OCC concedes that the state laws at issue in this case have not been preempted and that they continue to govern the conduct of nationally chartered banks.[9] Yet the 2004 rule prevents state agencies from effectively policing predatory and discriminatory lenders by stripping states of their sovereign enforcement powers. Indeed, it is difficult to conceive how a state can ever make binding laws if deprived of its power to enforce them. *Cf. Duro v. Reina*, 495 U.S. 676, 685 (1990) (noting that a "basic attribute" of sovereignty "is the power to enforce laws against all who come within the sovereign's territory").

The OCC's displacement of state enforcement authority flouts this Court's analysis in *St. Louis*. There, after concluding that Missouri's substantive law applied to national banks doing business within the state, the Court explained:

> [S]ince the sanction behind [the law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter. *To demonstrate the binding quality of a*

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[9] *See* Pet. App. 64a ("The OCC does not challenge the applicability of the state's anti-discrimination law to national banks' lending practices, nor does it question whether national banks must comply with state fair lending laws."); *Review of the National Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 108th Cong. (2004) (statement of John D. Hawke, Comptroller of the Currency, at 7), available at http://banking.sen.gov/public/ index.,cfm? Fuseaction=Hearings.Detail& HearingID=0aae2beb-535f-4c3e-9193-c1a632ac16b2..

> *statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of the law.*

263 U.S. at 660 (emphasis added).

Under the OCC's 2004 rule, however, while state law ostensibly retains its "binding quality," it no longer falls within the ambit of state enforcement. This turns the "very conception of the law," as contemplated in *St. Louis*, on its head.

3. Further, the OCC's regulation runs afoul of the principles of federalism embedded in our constitutional structure. *Amici* are aware of no other instance, except perhaps the Assimilative Crimes Act, 18 U.S.C. § 13, where *state* law provides the substantive constraint but *federal* agencies possess exclusive enforcement rights. Indeed, the OCC's rule presents the flipside of the executive commandeering condemned by this Court in *Printz v. United States*, 521 U.S. 899 (1997). There, the Court held that the federal government cannot conscript state and local officials to execute federal laws, because the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Id.* at 920 (citing *New York v. United States*, 505 U.S. 144, 168-69 (1992)).

Here, state officials seek to ensure the vigorous public enforcement of their fair lending laws, which the state views as vital for the protection of its residents. To be sure, these laws "can always be pre-empted under the Supremacy Clause if [they are] contrary to the national view, but in such a case it is

the Federal Government that makes the decision in full view of the public[.]" *New York*, 505 U.S. at 168. By contrast, if the OCC claims exclusive authority to enforce state law but fails to do so adequately, "it may be state officials who will bear the brunt of public disapproval." *Id.* at 169. Blurring this separation between state and federal responsibility would critically undermine "one of the Constitution's structural protections of liberty." *Printz*, 521 U.S. at 921.

4. Congress has long acknowledged and recently reaffirmed the centrality of state law to consumer protection and antidiscrimination in lending. On many occasions, Congress has expressly deferred to state law in the regulation of national banks. *See* 12 U.S.C. § 36(f) (1969); *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 132-33 (1969); *Brown v. Clarke*, 878 F.2d 627, 632 (2d Cir. 1989); *State ex rel. State Banking Bd. v. First Nat'l Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976).

Congress continued this tradition in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, and the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238. As petitioner notes, *see* Pet. 5-8, 32, Riegle-Neal was intended to *supplement* state enforcement by requiring additional OCC enforcement of state laws regarding community

reinvestment, consumer protection, fair lending, and interstate branching.[10]

In stark contrast to the OCC's 2004 rule displacing state enforcement authority, Riegle-Neal was *not* intended to "weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted at* 1994 U.S.C.C.A.N. 2068, 2074 ("Conf. Rep."). When Congress expanded interstate banking in Riegle-Neal, it preempted certain state laws, but, understanding the importance of other generally applicable state laws, went out of its way to *extend* to the newly permitted institutions the understanding espoused in *St. Louis* — that state laws apply to national banks unless preempted. *See* Conf. Rep. at 53 (noting that the Act "emphasizes" the applicability of community reinvestment, consumer protection, and fair lending laws). Had Congress wanted to make federal enforcement authority exclusive, it certainly knew how to do so, as it has often done with other *federal* statutes. *See, e.g.*, 2 U.S.C. § 437d(e) (providing FEC with exclusive civil enforcement authority under the Federal Election Campaign Act); 15 U.S.C. § 78o-7(c)(1) (providing the SEC with "exclusive authority to enforce" requirements related to nationally recognized statistical rating organizations). Particularly in light of "well-established judicial principles," Conf. Rep. at 53,

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[10] The Equal Credit Opportunity Act is to the same effect. 15 U.S.C. § 1691d(f) (requiring lenders to follow state antidiscrimination law).

Riegle-Neal's requirement that the comptroller enforce state law should therefore be understood to confer *concurrent*, rather than exclusive, enforcement authority.

Given Congress' reaffirmation of the role played by state law and the traditional understanding that the sovereign that enacts substantive rules normally is best positioned to enforce those rules, it is not surprising that members of the House Committee on Financial Services asked the OCC to delay its proposed displacement of state enforcement authority. Faced with the 2004 rule, twenty-three committee members asked the OCC to wait until Congress could hold hearings on whether the rules would undermine the congressional intent to promote vigorous enforcement of antidiscrimination and consumer protection laws. These representatives expressed concern that the proposed rules would "adversely and substantially impact the ability of the states to protect consumers," and emphasized a "deep[] concern[] that [the rules] represent a fundamental shift in bank regulation that goes to the very heart of the federal system." Letter from H. Comm. on Fin. Servs. to the Office of the Comptroller of the Currency (Feb. 11, 2004), *available at* http://governmentdocs.org/docs/upl198/foi236/doc1188/1188.pdf (PDF pages 1504-06). The OCC refused the request.

B. Exclusive OCC Enforcement Of State Lending Laws Will Undermine Their Effectiveness.

The OCC's insistence that it should enjoy exclusive authority to enforce state laws against

national banks not only runs afoul of central principles of federalism, but it also threatens to undermine state law because the OCC lacks the structure or resources to provide effective enforcement.

The OCC is not a consumer protection agency, and thus cannot provide an adequate substitute for state consumer protection efforts. "Unlike consumer advocates and state attorneys general, OCC defines itself as a neutral arbiter in terms of assisting consumers." U.S. GOV'T ACCOUNTABILITY OFFICE, OCC CONSUMER ASSISTANCE: PROCESS IS SIMILAR TO THAT OF OTHER REGULATORS BUT COULD BE IMPROVED BY ENHANCED OUTREACH 23 (2006) (hereinafter GAO, CONSUMER ASSISTANCE). The OCC historically has focused on protecting banks, not consumers: "The primary mission and long-standing cultural focus of federal depository institution regulators has been monitoring the safety and soundness of their institutions, rather than consumer protection." Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 73 (2005); *see also* Ip & Paletta, *supra* ("Federal regulators . . . have tended to focus more on the solvency of the institutions they oversee and less on individual consumer complaints.").

In contrast to state agencies, the OCC's processes use enforcement tools that are not adapted to consumer protection. The OCC's "confidential[l]" bank supervisory process" that is largely invisible to the public. *See* Julie L. Williams, Acting Comptroller of the Currency, Remarks Before the New York Bankers Ass'n (July 14, 2005), available at

http://www.occ.treas.gov/toolkit/newsrelease.aspx?Doc=2GS3IJZU.xml. Transparency, however, is "necessary for the deterrent function of law enforcement to work. Secret enforcement, at whatever level, fails in some of the most essential purposes of law enforcement in the marketplace." Amanda Quester & Kathleen Keest, *Looking Ahead After* Watters v. Wachovia Bank*: Challenges for Lower Courts, Congress, and the Comptroller of the Currency*, 27 REV. BANKING & FIN. L. 187, 237 (2008). This is particularly relevant to consumer protection laws. The OCC's procedures "do not appear to provide any public notice or other recourse to consumers who have been injured by violations identified by the OCC." *Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the H. Subcomm. on Fin. Insts. & Consumer Credit of the Comm. on Fin. Servs.*, 110th Cong. (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School, at 13-14) (hereinafter Wilmarth Testimony), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/hr042607.shtml. In order for consumers to protect themselves, they need to know about the potential for abuse. The OCC's enforcement techniques, "shrouded in secrecy," *id.* at 13, lack this crucial function of consumer protection laws.

C. The OCC Lacks The Institutional Capacity For Exclusive Enforcement Of State Laws.

1. If past performance is any indication of future results, leaving enforcement of state consumer protection laws to the OCC will result in severe

underenforcement. *See* Quester & Keest, *supra*, at 235 (criticizing the OCC's enforcement record); Peterson, *Federalism and Predatory Lending*, *supra*, at 81 (describing OCC oversight as "relatively lax").

The OCC lacks the staff and expertise to effectively monitor lending threats in all fifty states. Consequently, the OCC has failed to perceive problems even long after states have confronted them. For example, as recently as 2005, the OCC maintained that there was no reason to worry about enforcement of predatory and abusive lending laws against national banks, because national banks simply did not engage in predatory and abusive lending practices. *Congressional Review of OCC Preemption: Hearing Before the H. Comm. on Fin. Servs.*, 108th Cong. (2004) (statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency), available at http://commdocs.house.gov/committees/bank/hba93717.000/hba93717_of.htm; U.S. GOV'T ACCOUNTABILITY OFFICE, OCC PREEMPTION RULEMAKING: OPPORTUNITIES EXISTED TO ENHANCE THE CONSULTATIVE EFFORTS AND BETTER DOCUMENT THE RULEMAKING PROCESS 36 (2006) ("OCC maintained that national banks were not the source of predatory and abusive lending practices.") (hereinafter GAO, RULEMAKING).

A 2005 study, however, found that national banks were 4.15 times more likely to make higher-cost refinance loans to black borrowers than they were to white borrowers. CALIFORNIA REINVESTMENT COALITION, WHO REALLY GETS HIGHER-COST HOME LOANS? 3, 18 (2005), *available at* http://www.calreinvest.org/system/assets/14.pdf. Indeed, the

study concluded that national banks regulated by the OCC displayed the *greatest* disparities based on race, ethnicity, and income of all of the institutions studied. *Id.*

2. Given its resources, it is unsurprising that the OCC focuses on matters of *federal* law, while neglecting state law. Even during the 2004 rulemaking process, the preamble to the final rule stated only that national banks "would be regulated by strong *federal* standards and any abusive practices would not be tolerated," ignoring the presence of the state standards Riegle-Neal specifically endorsed. GAO, RULEMAKING 36 (emphasis added). Similarly, the OCC's handbook detailing fair lending examination procedures for its bank examiners fails to include any mention of state antidiscrimination laws. *See* OCC, FAIR LENDING EXAMINATION PROCEDURES: COMPTROLLER'S HANDBOOK (2006). In recent testimony before Congress, Comptroller John C. Dugan chronicled various federal laws that its examiners ensure national banks meet, but never once mentioned any effort to enforce state consumer protection laws. Most tellingly, he summarized OCC's consumer protection role as being "responsible for ensuring that national banks comply with applicable *federal* consumer protection laws." *Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2007) (statement of John C. Dugan, Comptroller of the Currency at 128) (emphasis added) (hereinafter Dugan Testimony).

Nor does the OCC have established procedures either for identifying applicable state laws or for

monitoring compliance with state requirements. GAO, OCC RULES AND STATE LAWS 23, 42. By contrast, ensuring compliance with state laws is precisely the expertise of state attorneys general and consumer protection agencies.

3. Unlike state agencies, which have substantial manpower throughout the state, the OCC has few personnel available to enforce state consumer protection laws. Nationwide, the OCC has only a few hundred employees who work exclusively on compliance supervision. Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, Preemption and the Evolving Business of Banking, Remarks Before the New York Bankers Ass'n Financial Services Forum (Mar. 25, 2003), available at http://www.occ.treas.gov/ftp/release/2004-25a.pdf. The attorneys detailed to compliance matters nationwide number only in the "dozens." *Id.* at 5.

The OCC receives roughly 70,000 complaints and inquiries on consumer issues each year. Dugan Testimony. With this incredible volume of incoming inquiries, responses to complaints have been staggeringly slow.[11] Moreover, the Customer Assistance Group (CAG) of the OCC, the "main division within OCC tasked with handling consumer

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[11] *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2007) (statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America), available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/plunkett041708.pdf.

complaints," has only one single centralized location in Houston, Texas. GAO, CONSUMER ASSISTANCE 2. In 2005, the CAG employed only 50 full-time employees. Wilmarth Testimony, at 17.

4. Given these institutional and resource constraints, effective enforcement of state consumer protection laws against national banks requires that the OCC work in conjunction with state officials, rather than excluding them. The states acutely feel the collateral consequences of discrimination and consumer predation, *see supra* pp. 4-7, and are well-situated to pursue vigorous enforcement of their own laws. State "[a]ttorneys [g]eneral welcome the efforts of other law enforcement agencies to enforce consumer protection laws on behalf of victimized consumers .... Consumers need more consumer advocates to enforce the laws in this area, not fewer." Comments and Recommendations from Members of NAAG Regarding OCC Proposed Exemption Rule (April 8, 2003).

As former Federal Reserve chairman Alan Greenspan noted, the response to illegal mortgage lending "should be with the states' attorney[s] general." Jane Wardell, *Greenspan Defends Subprime Market*, ASSOCIATED PRESS, Oct. 3, 2007, *available at* http://edition.cnn.com/2007/BUSINESS/10/02/britain.greenspan.ap/index.html (quotation marks omitted). The OCC's 2004 rule gets this exactly backwards.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Description of Individual *Amici Curiae*

Incorporated in 2006, the **Central New York Citizens in Action, Inc.,** was established to advance the common good and general welfare of the Central New York area through public policy research, education, and civic action, promote social and economic justice through education and advocacy, and encourage and support residents of Central New York in pursuing a more prosperous life by educating citizens on policy issues affecting low and moderate income people, the elderly, the disabled and youth. The organization has been designated as a 501(c)(4) organization by the IRS.

Central New York Citizens in Action was developed from the Utica Citizens in Action, a grassroots group of local citizens concerned with the welfare of low income persons and families. It was founded in 1997 to address social and economic issues facing poor, disabled, and elderly residents and children of Oneida County of New York State. The group of citizens comprising the Utica Citizens in Action determined that the poor and distressed members of the community would benefit from the involvement of a charitable organization formed solely for the purpose of educating the public on local social and economic issues, advocating for specific legislation and public policies, and encouraging citizen involvement on shaping policy affecting low income people. To this end, they organized a new organization — the Central New York Citizens in Action, Inc. — and incorporated it under the laws of the State of New York. Activities of the Central New York Citizens in Action consist of public education on

a wide range of policy issues, workshops, news conferences, and forums on community issues, community outreach and grassroots organizing, advocacy, lobbying, coalition development, and citizen training. The group focuses on poverty, community reinvestment, health care, housing, and other issues affecting the poor, elderly, and disabled persons and households.

The **Empire Justice Center** is a public interest law firm with offices in Rochester, Albany, White Plains and Central Islip, New York. The Empire Justice Center is also the statewide support center for legal aid and legal services offices, providing technical assistance and training on substantive law issues, serving as an information clearing house and coordinating state wide substantive law task forces for civil legal service attorneys across New York State. In addition, we provide legal assistance to low income individuals in a wide variety of civil matters, including housing, consumer protection, and foreclosure prevention. Of particular concern to the Empire Justice Center is ending discriminatory home mortgage lending practices that harm low and moderate income individuals and families based on race, color national origin, gender, disability, marital status, age and other bases prohibited by federal, state and local civil rights laws.

The **Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")** is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Among its other fields of specialization, the Lawyers' Committee works with

communities across the nation to combat, protest, and remediate discriminatory housing and lending practices. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C.

Long Island Housing Services, Inc. ("LIHS") is a private non-profit fair housing advocacy organization serving Suffolk County and Nassau County in Long Island and organized under the laws of New York with its principal place of business at 640 Johnson Avenue, Suite 8, Bohemia, New York 11716. LIHS' primary objectives are to promote equal housing opportunity, the racial and economic integration of Long Island and eliminate all forms of housing discrimination. These objectives include ensuring that people are treated equitably related to housing and the terms and conditions under which housing is secured and maintained. The housing search and lending transactions related to securing a mortgage and homeowner's insurance in the community of one's choice are key aspects of the agency's work and mission: the elimination of unlawful housing discrimination and promotion of decent and affordable housing through advocacy and education. LIHS seeks to join as an amicus organization as its experience informs of the tremendous need for enforcement and greater oversight to prevent lending abuses, so often perpetrated against those historically and currently disproportionately affected by illegal discrimination. Lack of ability to purchase homes with fair terms continues to severely impact racial and ethnic groups and hampers ability to increase wealth and move

from poverty. LIHS believes that the unfettered ability of the NY Attorney General is essential to allowing for proper enforcement of fair housing and fair lending laws to promote equal access to housing in Long Island.

The **National Community Reinvestment Coalition** is an association of more than 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development and vibrant communities for America's working families. Our members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority and women-owned business associations, local and social service providers from across the nation.

The **National Fair Housing Alliance ("NFHA")** is a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals. It was founded in 1988 to lead the battle against housing discrimination and to ensure equal housing opportunity for all people. Through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement, the NFHA promotes equal housing, lending, and insurance opportunities.

The **Neighborhood Economic Development Advocacy Project (NEDAP)** is a resource and advocacy center that provides legal and technical support to community groups and individuals in low and moderate income neighborhoods and communities of color in New York City and State.

Founded in 1995, NEDAP's mission is to promote community economic justice, and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty. Through community education, legal and public policy advocacy, corporate accountability, and research and documentation, NEDAP works with grassroots organizations to ensure that communities have access to fair and affordable credit and financial services, necessary for equitable community development and financial security. For the past decade, NEDAP has been at the forefront of anti-predatory lending and foreclosure prevention efforts in New York City and State. NEDAP founded and chairs New Yorkers for Responsible Lending, a coalition of 141 non-profit organizations throughout New York State who are committed to fighting predatory practices in the financial services industry. NEDAP also convenes the New York City Anti-Predatory Lending Task Force.

The **Progressive Research & Action Center, Inc.** is a nonprofit New York corporation organized to conduct public policy research, education, and civic action. The organization will be submitting an application to the IRS to become a 501(c)(3) tax exempt organization. Among the services of the organization are: Providing education to moderate and lower-income persons and families by offering innovative leadership training programs that help solve social and economic problems of moderate and lower-income communities; facilitating a unified, comprehensive community action program aiming to eventually eliminate poverty; researching and studying poverty-related issues involving education,

employment, health care, environmental, and other social justice issues; informing people about public policy, including new research findings; and encouraging public participation in the democratic process by providing information, training programs, media, and encouraging citizen empowerment. Recently, PRAC spearheaded local efforts to file an application with the Federal Communications Commission to establish a community-based radio station and has conducted advocacy efforts on local media reform. The organization has conducted educational programs focused on developing local and state solutions to global warming and other environmental issues. Finally, PRAC has focused on issues related to rising utility rates, predatory lending, and the banking crisis.

Public Citizen is a consumer advocacy, lobbying, and litigating organization with approximately 80,000 members nationwide. It has a longstanding interest in limiting the reach of federal preemption to situations in which Congress has made clear its intent to oust state law to serve important federal objectives. Public Citizen believes that, in the circumstances of this case — where states are willing and able to enforce important, non-preempted fair lending laws and the federal authorities are lacking in resources and initiative — preemption is unjustified.

South Brooklyn Legal Services (SBLS) is committed to ending discriminatory home mortgage lending practices that harm low- and moderate-income individuals and families based on race, color, national origin, gender, disability, marital status, age, and other bases prohibited by federal, state, and

local civil rights laws. SBLS works to provide education, counseling, policy research, legal referrals and/or direct legal assistance, and public policy advocacy on a wide range of fair housing, affordable housing, and fair lending issues, including equal access to home mortgage financing. In furtherance of SBLS' commitment to fair lending, these organizations support broad enforcement of federal, state, and local fair lending laws.

U.S Public Interest Research Group serves as the **Federation of State PIRGs ("U.S. PIRG: The Federation of State PIRGs")** which are non-profit, non-partisan public interest advocacy organizations with a million members nationwide. U.S. PIRG and the state PIRGs have actively sought, through their research and advocacy, to maintain our longstanding federal system in which federal rules serve as a floor of consumer protection and the states are allowed to enact stronger laws. We have also published numerous reports on high bank fees and unfair bank practices and the failure of federal regulators to protect consumers.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs ("Washington Lawyers Committee")** is an independently-governed organization established in 1968 by members of the city's leading law firms in response to racial disturbances that had swept Washington and other cities. The Washington Lawyers' Committee addresses issues of discrimination and entrenched poverty in the Washington, D.C. metropolitan area. Leveraging its own broad expertise in discrimination litigation with the resources of Washington, D.C.'s private bar, the Committee's litigation has a national

impact in the areas of housing, lending, employment, public accommodations, education, immigrant and refugee rights, and other aspects of urban life.

AMICUS CURIAE BRIEF

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ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Conference of State Bank Supervisors (the "CSBS") is a national association of state banking officials. Member officials regulate state-chartered banks and state-licensed financial services providers.[1]

Throughout this nation's history, the States have enacted and enforced laws designed to protect consumers against abusive, unfair and discriminatory lending practices. The competitive balance between the state and federal components of the country's dual banking system has also promoted innovative and responsive regulation.

This case involves an OCC (Office of the Comptroller of the Currency) regulation prohibiting the States from enforcing valid, non-preempted laws against national banks and their operating subsidiaries. By upholding that regulation, the decision below undermines federalism principles that are cornerstones of our nation's political system and financial regulatory structure. It also serves to weaken the competitive equality of state-chartered financial institutions within the dual banking system. The decision below is of great concern to the CSBS,

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

which has a compelling interest in supporting the petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two principal reasons. First, the Court should resolve the present split among the courts of appeal as to whether *Chevron* applies to federal agency preemption determinations. Second, the Court should address whether federal agencies may, in the absence of a clear congressional statement, adopt regulations that prohibit the States from enforcing valid, non-preempted state laws.

I. The Courts Of Appeal Are Divided As To Whether *Chevron* Applies In Determining The Validity Of Agency Regulations Purporting To Preempt State Laws.

The central issue in this case is whether the OCC exceeded its statutory authority when it issued a regulation (12 C.F.R. § 7.4000) barring States from enforcing against national banks and their operating subsidiaries valid, non-preempted laws. The court below upheld the regulation after determining that the OCC's interpretation of the National Bank Act, 12 U.S.C. §§ 1 *et seq.* ("NBA"), was entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Pet. App. 15a-32a.

This Court has never ruled definitively on the question of whether *Chevron* applies to federal agency preemptive rules. It has, however, commented on the

issue. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the petitioner contended that a reviewing court must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, the Court assumed without deciding that the question of a statute's preemptive effect "must always be decided *de novo* by the courts." *Id.* at 744.

In *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559 (2007), the petitioner similarly argued that "because preemption is a legal question for determination by the courts, [a preemptive agency regulation] should attract no deference." *Id.* at 1572. The Court again did not directly address this argument. Instead, the majority opinion held that "the level of deference owed to the regulation is an academic question," *id.*, because "the NBA itself – independent of OCC's regulation – preempts the application of the pertinent Michigan laws to national bank operating subsidiaries." *Id.* at 1572 n.13.

The three dissenting Justices in *Watters* took a different view. They maintained that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something *less* than *Chevron* deference." *Id.* at 1584 (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.) (emphasis added).

The circuits are divided on the question. The Tenth Circuit has held that a federal agency's preemption determinations are not entitled to *Chevron* deference, while the Second, Fourth, Sixth, and Ninth Circuits

have granted *Chevron* deference to such agency rulings. *See* Pet. Cert. 19-20 (citing decisions from the Second, Sixth and Tenth Circuits); *see also Nat'l City Bank of Indiana v. Turnbaugh*, 463 F.3d 325 (CA4 2006), *cert. denied*, 127 S. Ct. 2096 (2007); *Wells Fargo, N.A. v. Boutris*, 419 F.3d 949 (CA9 2005).

A. *Chevron* Should Not Apply to Preemptive Rules Issued by Federal Agencies.

This Court should grant the petition and hold that *Chevron* deference is not available when a federal agency issues an order or rule expressing an opinion on the preemptive scope of a federal statute. The judicial branch should instead undertake a *de novo* review of federal agency preemption determinations. This will ensure that agencies resolve preemption issues in accordance with the Constitution's allocation of federal and state power.

As this Court emphasized in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the power of Congress to adopt legislation preempting "areas traditionally regulated by the States . . . is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* at 460. Accordingly, this Court has required Congress to "make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 461 (citations and internal quotation marks omitted). Indeed, "the whole jurisprudence of preemption" is one of the important ways in which "this Court has participated in maintaining the federal balance."

United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

Although the issue of *Chevron* deference was not addressed in *Gregory*, the Court emphasized that "we must be absolutely certain that Congress intended" to adopt legislation that alters the "state-federal balance." *Gregory*, 501 U.S. at 464. As the Court stated, to "give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Id.* (emphasis in original) (quoting L. Tribe, *American Constitutional Law* § 6.25, p. 480 (2d ed. 1988) (referencing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (declining to review federalism limitations on congressional Commerce Cause powers)).

In another case that raised important issues concerning the limits of federal power, this Court refused to defer under *Chevron* to an agency regulation. The Court concluded that the agency rule broadly interpreted a federal statute in a manner that "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). "[T]o avoid [the] significant constitutional and federalism questions" created by the agency's interpretation, this Court "reject[ed] the request for administrative deference." *Id.* at 161. The Court ultimately invalidated the regulation in the absence of "a clear statement from Congress that it intended . . . to readjust the federal-state balance." *Id.* at 174 (emphasis added). For the same reasons, the court

below should have held that *Chevron* was inapplicable in this case.

The judiciary's essential role in determining the preemptive scope of federal statutes should not be abdicated to federal agencies. The Second Circuit's decision demonstrates that the granting of *Chevron* deference to preemptive regulations will give federal agencies virtually unlimited discretion to override state law as long as the relevant federal statutes do not unambiguously prohibit such regulations. *See* Pet. App. 21a (holding that "[a]lthough the precise scope of 'visitorial' powers is not entirely clear from the text of [12 U.S.C.] § 484(a), . . . we cannot agree with the Attorney General that the statute clearly precludes the interpretation the OCC has adopted").

Thus, the practical effect of the Second Circuit's decision is to create a presumption favoring the agency's power to issue a preemptive ruling. Such a result is contrary to this Court's admonition that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). The Court has similarly explained that the success of a preemption claim depends on whether "language in the federal statute . . . reveals an explicit congressional intent to pre-empt state law" or, if not, whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nevertheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

The *Chevron* framework is inappropriate for judging the validity of agency preemption determinations.[2] In view of our nation's commitment to federalism, a reviewing court may not properly decide that Congress intended to preempt state law simply by deferring to an agency's interpretation of an "ambiguous" statute.

B. The OCC's Preemptive Rules, in Particular, Should Not Be Reviewed Under *Chevron*.

The OCC's self-interest in issuing preemptive rules provides a special and compelling reason for rejecting its request for *Chevron* deference. Section 7.4000 is but one of a series of preemptive rules and opinions that the OCC has issued in recent years. *See Watters, supra* (upholding the validity of 12 C.F.R. § 7.4006, adopted in 2001, preempting the application of state laws to operating subsidiaries of national banks); 69 Fed. Reg. 1904 (Jan. 13, 2004) (adopting regulations preempting the application of a wide range of state laws to national banks). In defending the OCC's preemption initiatives, one former OCC head declared that preemption of state law is "a significant benefit of

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[2] *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. L. Rev. 695, 698-99, 705-06 (2008) (arguing that *Chevron* deference should not apply to federal agency preemption determinations because agencies lack the requisite "expertise on important issues of state autonomy and federalism," *id.* at 698); *accord*, Nicholas Bagley, *Note: The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2293-97 (2004).

the national [bank] charter – a benefit that the OCC has fought hard over the years to preserve."[3]

The OCC has a substantial interest in persuading the largest banks to operate under national charters. The OCC's budget is almost entirely funded by national bank assessments, and the biggest banks pay the highest assessments.[4] In response to the OCC's aggressive preemption efforts, several large, multistate banks have converted from state to national charters, thereby producing a significant increase in the OCC's assessment revenues.[5]

Further, the OCC's record of enforcing consumer protection laws has been described as "a long history of inaction."[6] Publicly available information indicates that, during the entire period of 1995-2007, the OCC issued only 13 public enforcement orders against national banks for violations of consumer protection

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[3] Speech by Comptroller of the Currency John D. Hawke, Jr., on Feb. 12, 2002, quoted in Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 236, 274 (2004).

[4] *See* Wilmarth, *supra* note 3, at 276.

[5] *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. (2008) (forthcoming), *available at* http://www.ssrn.com/abstract=1137981, at 56-58, 64-66; Wilmarth, *supra* note 3, at 233-36, 274-79, 289-93.

[6] Bar-Gill & Warren, *supra* note 5, at 56-58, 64-66 (quote at 66); *see also* Wilmarth, *supra* note 3, at 232, 274-77, 289-93, 310-16, 351-56 (contending that the OCC's record of enforcing consumer protection laws is "unimpressive," *id.* at 232).

laws.[7] Only one of those orders included a charge that the bank violated state laws.[8] In that case, the OCC only took action after the public became aware that a California prosecutor was investigating the offending bank.[9] This feeble enforcement record is consistent with the OCC's budgetary incentives to follow policies that encourage large banks to operate under national charters.

The States' record presents a dramatic contrast. The New York State Attorney General and other state officials have used their enforcement powers to prosecute financial service providers for a wide range of unlawful practices over the past decade. Frequently, they have done so with greater vigor than their federal counterparts.[10] In 2003 alone, "state bank supervisory agencies performed more than 20,000 investigations in response to consumer complaints about abusive lending practices, and those

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[7] *See* Bar-Gill & Warren, *supra* note 5, at 65; Wilmarth, *supra* note 3, at 353, 355-56; Stephanie Mencimer, "No Account," *New Republic*, Aug. 27, 2007, at 14.

[8] *See In re Providian Nat'l Bank*, June 28, 2000, 2000 OCC Enf. Dec. LEXIS 55, at *1 (alleging violations of California statutes prohibiting unfair business practices).

[9] *See* Wilmarth, *supra* note 3, at 316 & n.357; "Correspondence," *New Republic*, Oct. 8, 2007, at 7 (response by Stephanie Mencimer to letter from Comptroller of the Currency John C. Dugan).

[10] *See, e.g.*, Wilmarth, *supra* note 3, at 316, 348-52, 354-55; Amir Efrati & Aaron Lucchetti, "U.S. News: Cuomo Blazes Own Trail as Wall Street Cop," *Wall St. J.*, Aug. 11, 2008, at A3; Brooke Masters, "In Spitzer's footsteps: Cuomo trains his sights on financial services," *Fin. Times*, June 5, 2007, at 1.

investigations produced more than 4,000 enforcement actions."[11]

Given the OCC's obvious financial motives for issuing preemptive rules and its anemic enforcement record, its regulation barring State enforcement actions should be denied any deference under *Chevron*.[12]

C. The Court Should Address the Tenth Amendment Issues Raised by the OCC's Regulation.

The OCC agrees that the NBA does not preempt state antidiscrimination laws, including New York State Executive Law § 296-a, and that those laws therefore apply to national banks.[13] Nevertheless, the OCC's regulation, 12 C.F.R. § 7.4000 (a)(2)(iv) & (b)(2), purports to bar New York from enforcing § 296-a against national banks or their operating subsidiaries. The regulation thereby impermissibly infringes upon New York's sovereign authority.

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[11] Wilmarth, *supra* note 3, at 316 (emphasis added).

[12] *See* Wilmarth, *supra* note 3, at 232-33, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J. L. & Pub. Pol'y 203, 206-07, 286 (2004).

[13] *See* Pet. App. 15a, 29a (recognizing that Executive Law § 296-a is not preempted by the NBA or the OCC's regulation); *see also* OCC Interpretive Letter No. 998, Mar. 9, 2004, from OCC Chief Counsel Julie L. Williams to Rep. Barney Frank, *available at* http://www.occ.treas.gov/interp/aug04/int998.pdf.

In *Heath v. Alabama*, 474 U.S. 82 (1985), this Court explained that the authority of States to enforce their criminal laws "derive[s] from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Id.* at 89. Each State also "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 U.S. 313, 320 (1978), *superseded by statute on other grounds*, Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2)), *as recognized in United States v. Lara*, 541 U.S. 193, 197-98 (2004).

As Judge Cardamone observed in his dissenting opinion below, "[i]t is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws." Pet. App. 55a (Cardamone, J., dissenting). In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court observed that "'[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.'" *Id.* at 556 (quoting *McClesky v. Zant*, 499 U.S. 467, 491 (1991)).

The majority opinion below concluded that the OCC's regulation "preserves state sovereignty" because non-preempted state laws "remain enforceable by private parties, as well as by the OCC itself." Pet. App. 29a. That conclusion is plainly at odds with this Court's decisions and with practical reality.

The Court has repeatedly upheld the sovereign authority of each State to enforce its own criminal laws. It has done so notwithstanding the fact that other entities may have power to enforce similar laws against the same persons. In *Heath*, the Court stated that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws." 474 U.S. at 93 (emphasis in original). Similarly, in *Bartkus v. Illinois*, 359 U.S. 121 (1959), the Court determined that "[i]t would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Id.* at 137 (footnote omitted).

Ultimately, the OCC's regulation "confuses which governmental entity citizens should hold accountable for the enforcement of state laws against national banks." Pet. App. 59a (Cardamone, J., dissenting). Further, the OCC is "unlikely to be as motivated or as effective as the states in responding to the complaints of a particular state's citizenry regarding the enforcement of that state's laws." *Id.* This problem has implications that have recently come to the forefront. Some analysts believe that the OCC's preemption of state consumer protection laws and state enforcement actions contributed to the severity of the current credit crisis by "stifling . . . prescient

state enforcers and legislators" who tried to prevent irresponsible lending.[14]

This Court invalidated a similar federal invasion of state sovereignty in *New York v. United States*, 505 U.S. 144 (1992). There, the Court struck down a federal law that used coercive measures to interfere with the States' regulatory and enforcement authority. The challenged statute in *New York* would have forced state governments to carry out a congressionally-mandated nuclear waste disposal program. The provision was unconstitutional because it "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (internal quotation marks and citation omitted). The Court's anti-commandeering principle reflected its concern that political accountability is "diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

The federal law invalidated in *New York* presented the mirror image of the OCC regulation at issue here. In *New York*, Congress sought to compel the States to implement a federal mandate. In this case, the OCC's regulation seeks to *prevent* the States from enforcing a State mandate. In each case, the federal provision is

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[14] *See, e.g.*, Robert Berner & Brian Grow, "They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington," *Bus. Week*, Oct. 20, 2008, at 36, 38; *see also* Nicholas Bagley, "Subprime Safeguards We Needed," *Wash. Post*, Jan. 25, 2008, at A19.

unlawful because it treats the States as "'mere political subdivisions of the United States'" and fails to recognize the "'residuary and inviolable sovereignty,'. . . reserved explicitly to the States by the Tenth Amendment." *Id.* at 188 (quoting *The Federalist* No. 39, p. 245 (James Madison) (C. Rossiter ed. 1961)).

II. Even If *Chevron* Applies, The Court Below Erred In Holding That The OCC's Regulation Was Entitled To Deference.

A. Congress Has Not Authorized the OCC to Prohibit States From Enforcing Valid, Non-preempted State Laws.

It is clear that "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative [agency] is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Rather, such deference is appropriate only if the regulation is "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.*[15] In this case, however, Congress has not authorized the OCC to bar the States from enforcing valid, non-preempted state laws.

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[15] *Accord, Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *see also* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. L. Rev. 727, 771 (2008) ("the *Chevron* standard should apply to agency opinions about preemption in only one circumstance: where Congress has expressly delegated authority to the agency to preempt").

The OCC and the court below relied primarily on 12 U.S.C. § 484(a). Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or [exercised by Congress or a committee thereof]." The OCC and the court focused mostly on the first clause of § 484(a). However, they applied an inappropriately restrictive reading to the "vested in the courts of justice" clause, which is key to this case.

The original NBA, enacted in 1864 (the "1864 Act"), included the prohibition on "visitorial" powers in the same section that authorized the OCC to make periodic examinations of national banks. *See* Act of June 3, 1864, c. 106, § 54, 13 Stat. 116. The 1864 Act also empowered the OCC to make special examinations of national banks in formation to determine whether those embryonic banks should be given certificates of authority to "commence the business of banking." Act of June 3, 1864, *supra*, §§ 17, 18, 13 Stat. 104, 105.

The current NBA provides the OCC with the same examination and chartering powers. *See* 12 U.S.C. §§ 481, 26, 27. In view of the OCC's authority to charter and examine national banks, *Watters* held that 12 U.S.C. § 484(a) would preclude the States from imposing a "registration" or "inspection" regime on national banks. 127 S. Ct. at 1568-69.

The 1864 Act and the current NBA also have authorized the OCC to appoint receivers for insolvent national banks or banks that fail to redeem their circulating notes. *See* Act of June 3, 1864, *supra*,

§§ 31, 32, 50, 13 Stat. 108-09, 114-15 (codified as amended in 12 U.S.C. §§ 191, 192). The power to appoint receivers is a significant source of administrative enforcement authority for the OCC. *See Cooper v. O'Connor*, 99 F.2d 135, 139 (CADC), *cert. denied*, 305 U.S. 643 (1938) (noting that the Comptroller is empowered to place a receiver "in complete charge" of a national bank).[16] In view of the administrative enforcement powers the OCC possesses, *Watters* concluded that a State "cannot confer on its [banking] commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks." 127 S. Ct. at 1569 (footnote omitted).

Watters is consistent with this Court's decision in *Guthrie v. Harkness*, 199 U.S. 148 (1905). In *Guthrie*, the Court explained that the OCC's administrative powers of "investigation" (through bank examinations) and "appointment of a receiver" were the key "visitorial powers" referred to in 12 U.S.C. § 484(a). *Id.* at 159. However, *Guthrie* also observed that "visitorial powers . . . 'vested in the courts of justice'" are "expressly excepted from the inhibition of [§ 484(a)]." *Id.* As shown *infra* in Part II.B., § 484(a) was never interpreted to preempt judicial proceedings

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[16] Since 1966, the OCC has exercised additional administrative enforcement powers against national banks under provisions of § 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(b), (e), (i). This includes authority to issue cease-and-desist orders as well as orders removing officers and directors and orders imposing civil money penalties.

by state officials to enforce state laws until 2004, when the OCC adopted its challenged regulation.[17]

The "vested in the courts of justice" clause of § 484(a) and other provisions of the NBA make clear that Congress has not authorized the OCC to prevent the States from filing suits to enforce their laws. The clause is derived from § 54 of the 1864 Act, which exempted "visitorial powers . . . vested in the several courts of law and chancery." Act of June 3, 1864, *supra*, § 54, 13 Stat. 116. The current language of § 484(a), like § 54, contains no restriction on judicial proceedings instituted by state officials. The plain language of § 484(a) thus contradicts the OCC's regulation, which seeks to bar state officials from gaining access to "the courts of justice" to enforce their laws against national banks.

Other NBA provisions confirm the absence of OCC authority to bar suits by state officials. Section 93(a) of the NBA (which is derived from § 53 of the 1864 Act, 13 Stat. 116), provides that the OCC can sue in federal court to rescind the charter of a national bank if any of its directors "knowingly violate, or knowingly permit any of [its] officers, agents, or servants . . . to violate"

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[17] *Watters* dealt only with the question of whether a state official could exercise certain types of administrative enforcement powers over national banks and their operating subsidiaries. *See* 127 S. Ct. at 1565-66 (describing the administrative powers of Michigan's banking commissioner). *Watters* did not consider whether § 484(a) bars the States from enforcing valid, non-preempted state laws against national banks by using other methods, including the filing of judicial proceedings. Thus, as the court below acknowledged, "*Watters* does not directly address the questions at issue here." Pet. App. 20a.

any provision of the NBA. 12 U.S.C. § 93(a). Section 93(a) does not authorize the OCC to sue a national bank based on violations of *state* laws, nor does it prevent state officials from suing national banks to enforce state laws. Similarly, § 1 of the NBA (derived from § 1 of the 1864 Act, 13 Stat. 99-100), provides that the OCC is "charged with the execution" of the NBA. 12 U.S.C. § 1. This provision likewise does not authorize the OCC to "execute" state laws. It therefore rebuts the OCC's claim of exclusive authority to enforce state laws against national banks.

The OCC has also asserted that § 36(f)(1)(B) of the NBA supports its claim of "exclusive visitorial authority." 69 Fed. Reg. 1895, 1897 (Jan. 13, 2004). Section 36(f)(1)(B) provides that the OCC "shall . . . enforce[]" state laws applying to an interstate branch of national banks. 12 U.S.C. § 36(f)(1)(B). For two reasons, § 36(f)(1)(B) does not support the OCC's contention or the regulation at issue.

First, the provision applies only to interstate branches of national banks. Therefore, it cannot be construed to repeal by implication the "vested in the courts of justice" clause of § 484(a), which applies to national banks in their entirety. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 127 S. Ct. 2518, 2532 (2007) (holding that "repeals by implication are not favored and will not presumed unless the legislature's intention to repeal [is] clear and manifest") (internal quotation marks and citation omitted).

Second, the conference report on the 1994 legislation that enacted § 36(f)(1)(B) emphasized that

"States have a legitimate interest in protecting the rights of their consumers, businesses, and communities," and that "Congress does not intend that [the 1994 law] . . . weaken States' authority to protect the interests of their consumers, businesses, or communities."[18] The conference report further stated that "[u]nder well-established judicial principles, national banks are subject to State law in many significant respects . . . . The [1994 law] does not change these judicially established principles."[19] Thus, Congress clearly did not intend that § 36(f)(1)(B) would impair the States' existing authority to enforce their laws against national banks.

The NBA's provisions dealing with judicial proceedings confirm that Congress has not immunized national banks from suits in state court by state officials for violations of state law. The 1864 Act, like the current NBA, provided that each national bank would have the express authority to "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." Act of June 3, 1864, § 8, 13 Stat. 101 (codified as amended at 12 U.S.C. § 24 (Fourth)). Section 57 of the 1864 Act gave federal and state courts concurrent jurisdiction over "suits, actions, and proceedings" against national banks. *Id.*, § 57, 13 Stat. 116-17.

The only exception to this general grant of concurrent jurisdiction to state courts was that federal

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[18] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (emphasis added).

[19] *Id.* (emphasis added).

courts would have exclusive jurisdiction against "all proceedings to enjoin the [OCC]." *Id.*, 13 Stat. 117. Congress placed no limitation on suits by state officials and thus did not qualify the concurrent jurisdiction of state courts over suits involving national banks.

The provisions of § 57, as modified by several later enactments, were ultimately codified in 12 U.S.C. § 1348.[20] Section 1348 gives federal district courts exclusive original jurisdiction over (i) suits filed by federal officials against national banks, (ii) proceedings to wind up the affairs of national banks, and (iii) actions by national banks "to enjoin the Comptroller of the Currency or any receiver acting under his direction." However, § 1348 provides that national banks "shall, for the purposes of *all other actions* by or against them, be deemed citizens of the States in which they are respectively located." 12 U.S.C. § 1348 (emphasis added). Section 1348 preserves the general concurrent jurisdiction of state courts over suits involving national banks. It does not bar suits by state officials.

The OCC's regulation is plainly inconsistent with these NBA provisions. It therefore exceeds the agency's rulemaking authority under 12 U.S.C. §§ 371(a) and 93a. Under § 371(a), the OCC may issue regulations that prescribe "restrictions and requirements" for national bank real estate loans. However, § 371(a) provides that national banks must

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[20] *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 559-61, 565-67 (1963); *see also Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 310-12 (2006).

also comply with the uniform interagency real estate lending standards established under 12 U.S.C. § 1828(*o*). One of those standards requires national banks to adopt lending policies promoting "[c]ompliance with all real estate laws and regulations, including anti-discrimination laws." 12 C.F.R. Pt. 34, Subpt. D, App. A (OCC's version of uniform standards, under the heading "Loan Portfolio Management Considerations").

On its face, this uniform standard requires national banks to comply with applicable state laws, including New York State Executive Law 296-a. Accordingly, § 371(a) does not permit the OCC to adopt a regulation that undermines the compliance duties of national banks by blocking state officials' enforcement of controlling state law.

Under 12 U.S.C. § 93(a), the OCC may adopt rules "to carry out the responsibilities of the office." *Gonzales v. Oregon* held that a similar federal statute did not authorize the Attorney General to "make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." 546 U.S. at 258. The Court concluded that the Attorney General's authority to adopt rules executing "his functions" under 12 U.S.C. § 871(b) did not empower him to issue a preemptive regulation that went "well beyond the statute's specific grants of authority." *Id.* at 264-65. Like § 871(b), 12 U.S.C. §§ 371(a) and 93a are "generic authorizations of rulemaking authority, . . . and neither says a word about preemption." *Watters*, 127 S. Ct. at 1583 n.23 (Stevens, J., dissenting). Those provisions therefore

"provide no textual foundation for the OCC's assertion of preemption authority." *Id.*

B. This Court and Other Courts Have Repeatedly Upheld the States' Authority to Institute Judicial Proceedings to Enforce Their Laws Against National Banks.

In two cases decided soon after Congress passed the 1864 Act, this Court confirmed the right of state and local officials to sue national banks. *See Nat'l Bank v. Kentucky,* 76 U.S. (9 Wall.) 353 (1870) (suit by Kentucky); *Waite v. Dowley*, 94 U.S. 527 (1876) (suit by Vermont local official). Neither decision mentioned the NBA's restriction on "visitorial powers."

In *Kentucky*, the Court stated that Kentucky's lawsuit to collect taxes from a national bank was "no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it." 76 U.S. (9 Wall.) at 362-63. In *Waite,* the Court held that a Vermont statute, which authorized judicial proceedings to enforce a national bank's duty to furnish shareholders' names and addresses, was a "proper exercise of the rightful powers of the State." 94 U.S. at 534.

In two subsequent decisions, the Court upheld the authority of state attorneys general to file *quo warranto* actions to enforce state laws against national banks. *See First Nat'l Bank in St. Louis v. Missouri,* 263 U.S. 640, 659-61 (1924); *First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 427-28 (1917). In *St. Louis*, the national bank and the United States argued

that Rev. Stat. § 5241 – the predecessor of 12 U.S.C. § 484(a) – barred Missouri's attorney general from suing the bank. *See* 263 U.S. at 643 (summary of bank counsel's argument); *id.* at 645 (summary of Solicitor General's argument). This Court, however, upheld the Missouri attorney general's power to institute judicial enforcement proceedings. It declared that "the power of enforcement . . . is essentially inherent in the very conception of law." *Id.* at 660.

The Court determined in *St. Louis* that Missouri was seeking "to vindicate and enforce its own law" and was "neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers." *Id.* As the dissent below observed, the latter two functions – which Missouri was **not** trying to exercise – "line up precisely with the definition of 'visitorial power' provided . . . in *Guthrie* [199 U.S. at 158]." Pet. App. 57a-58a (Cardamone, J., dissenting).

This case presents the same situation as *St. Louis*. The Petitioner here is seeking to enforce a State law prohibiting discrimination in lending. The OCC, in turn, has conceded the absence of any conflict between that State law and applicable federal law. Therefore, as in *St. Louis*, the State is not seeking to enforce a federal law or to interfere with the authorized activities of a national bank.

Judge Cardamone's dissent also cited several federal and state court decisions that have affirmed the right of state officials to sue national banks since *St. Louis*. *Id.* at 50a-51a. Another federal court decision shows that the OCC acknowledged the States'

authority to file judicial enforcement proceedings in 1999. In *First Union National Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999), the OCC obtained an injunction to prevent Connecticut's banking commissioner from issuing administrative cease-and-desist orders against three national banks.

In *Burke*, "the OCC claim[ed] that . . . Congress intended the OCC to have exclusive administrative enforcement authority over national banks for all laws, including state banking laws." *Id.* at 135 (quote), 140. The *Burke* court agreed with the OCC, but it also concluded that "a state may seek enforcement of its state banking laws in either federal or state court" by reason of the "vested in the courts of justice" clause in 12 U.S.C. § 484(a). *Id.* at 146.

Further, in rejecting the state banking commissioner's Tenth Amendment argument, the court emphasized that its injunction would not "preclude the Commissioner from seeking enforcement of this state banking statute against the plaintiff national banks through the courts." *Id.* at 148-49, 151. For a time, the OCC "acquiesced to" the court's conclusion in *Burke*, and it did not seek to bar state officials from enforcing their laws through judicial proceedings. *See* Pet. App. 109a-110a (district court decision). Then, in 2004, the OCC adopted the challenged regulation.

The 2004 regulation unmistakably exceeds the OCC's statutory authority. It also creates the identical Tenth Amendment problems that the *Burke* court carefully avoided. This Court should therefore review the decision below and invalidate the regulation.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C.
AND
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real-estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real-estate professionals and real-property owners in important matters before the legislatures, courts, and executives of the federal and state governments. The issues presented in those matters include fair-lending

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that counsel of record for all parties received notice of *amicus*'s intention to file this brief at least 10 days prior to the due date and that all parties have consented to the filing of this brief. Letters reflecting the parties' consent have been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

practices, equal opportunity in housing, real-estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Glenmont Hills Assocs. Privacy World at Glenmont Metro Centre v. Montgomery County*, 128 S. Ct. 2914 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

NAR is interested in fighting discriminatory practices in mortgage lending in order to ensure the ample availability of funds for mortgage lending. The livelihood of NAR's members depends on lending practices that are fair, transparent, and nondiscriminatory. Such lending practices ensure that mortgages will be available to the maximum number of consumers who wish to purchase homes. Home ownership is in the best interest of the country as a whole as well as to NAR, and it continues to be recognized as a favored public policy goal at both the federal and state levels. In contrast, when national banks discriminate in their mortgage lending, fewer funds are available for home purchases. State antidiscrimination laws play an important role in fighting discriminatory lending practices. These laws are

most effectively enforced by the States themselves. Therefore, enforcement of state anti-discrimination laws by the States is crucial to ensuring that national banks have fair, transparent, and non-discriminatory lending practices, and that they do not obtain a competitive advantage over similarly situated entities that must comply with generally applicable state laws.

NAR's interests in this case also arise from its status as a leading advocate for housing issues and its substantial and longstanding commitment to affordable housing, equal opportunity in housing, and fair housing compliance. These concerns are also acutely affected by and related to the mortgage lending issues at the core of this case, and to the extent this decision denies States the authority to enforce their fair lending statutes the housing interests of NAR and its members may be similarly compromised. In addition, as explained below, the broad scope of the authority seized by the Office of the Comptroller of the Currency ("OCC") in this case has widespread implications for state enforcement of other state statutory and regulatory schemes that may be applicable to NAR's members.

Accordingly, NAR's interests will be directly affected by the outcome of this case.

SUMMARY OF ARGUMENT

This case concerns who will enforce valid, generally applicable, and non-preempted state laws against national banks and their non-bank operating subsidiaries. The OCC concedes that national banks and their operating subsidiaries must comply with these state laws, such as New York's anti-discrimination laws at issue in this case. However, the OCC asserts that its "visitorial powers" under the National Bank Act broadly vest in the OCC "exclusive visitorial authority" to enforce these state laws against national banks and their operating subsidiaries. The OCC has set forth at 12 C.F.R. § 7.4000 that claim of authority to displace the ability of state attorneys general to enforce laws enacted by state legislatures. The OCC's regulation is invalid.

A State's right to enforce its own laws is a core aspect of its sovereignty. Although federal law can preempt state law, where state law is not preempted and entities are required to abide by state law, a State retains the authority to enforce such laws. As this Court explained many years ago: "To demonstrate the binding quality of a statute, but deny the power of enforcement[,] involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *First Nat'l Bank v. Missouri*, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds). Indeed, neither the OCC nor the court below identified any other situation in which States are precluded from enforcing their valid laws and enforcement authority of those laws rests exclusively in a federal agency. Even assuming basic principles of federalism and this Court's jurisprudence would

afford Congress authority to deny States the right to enforce their own laws, only Congress — through an express statutory enactment — could so deprive States of that authority. A federal agency has no implicitly delegated authority to decide whether to displace state enforcement of valid state laws; therefore, this is not an issue on which a federal agency's statutory interpretation is entitled to *Chevron*[3] deference.

Here, Congress has not expressly stripped States of their authority to enforce state laws that apply to national banks and their operating subsidiaries, nor has it expressly granted to OCC the power to strip States of that authority. And neither the OCC nor the court below claimed otherwise. In fact, the statutory provisions on which the OCC and the court below relied do not divest States of their inherent enforcement authority or speak with sufficient clarity to authorize the OCC to deprive States of such authority. Where Congress did address the OCC's authority to ensure that national banks and their operating subsidiaries abide by state law, it gave the OCC — at most — concurrent authority with States to enforce that law. *See* 12 U.S.C. § 1818(b).

Even aside from the fact that reading statutes to grant implicitly federal agencies the discretion to strip States of their authority to enforce non-preempted state law conflicts with basic principles of federalism, there is a second reason why the Court should not presume such implicit authority in this case. The OCC's budget comes almost exclusively from assessments that national banks pay. In fiscal year 2007, the OCC collected $666 million — or 95.8

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[3] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

percent of its total operating budget — through such assessments. Moreover, state banks always have the option of obtaining a national charter and, thereby, becoming national banks. The OCC, therefore, has a strong budgetary incentive to entice state banks to make that switch by increasing the attractiveness of a national charter as compared to a state charter. Through § 7.4000, the OCC purports to leave national banks' and their operating subsidiaries' compliance with state law subject only to OCC oversight, while their state bank competitors remain subject to the enforcement authority of the state attorneys general. Being subject to oversight by the OCC alone provides a significant incentive for more state banks to obtain national charters, which in turn increases the OCC's budget and the breadth of its authority over the banking system.

Finally, the scope of the OCC's claim of authority is incredibly broad. The OCC has already authorized national banks to engage in activities that are only tangentially related to the "business of banking," including the provision of Medicare and Medicaid counseling to customers, the collection and disbursement of insurance benefit payments, and the real estate development of a mixed-use building with several floors of condominiums. Accordingly, when national banks or their operating subsidiaries engage in those activities, or others the OCC may subsequently empower them to undertake, States will be unable to enforce against those companies their valid, generally applicable, and non-preempted laws, such as their consumer protection and fair housing laws. Other players in those industries will remain subject to state enforcement, creating an unlevel playing field and giving rise to large gaps in the

enforcement of otherwise uniformly applicable state laws in those industries. And achievement of the public policy objectives of state legislatures in adopting such laws will inevitably be subject to the OCC's discretion and whatever resources and abilities it may have available to apply to such enforcement.

REASONS FOR GRANTING THE PETITION

I. CONGRESS DID NOT STRIP STATES OF THEIR SOVEREIGN RIGHT TO ENFORCE NON-PREEMPTED STATE LAWS AGAINST NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES, NOR DID IT GRANT TO OCC THE AUTHORITY TO DO SO

A. Absent An Express Authorization From Congress, Administrative Agencies Cannot Strip States Of Their Sovereign Rights

This Court's cases make clear that, when Congress seeks to alter the federal-state balance of power, Congress must "make its intention . . . unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted); *see United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

This clear-statement requirement is especially pronounced when it is a federal agency — and not Congress — that is altering the basic allocation of authority between the federal and state governments. As this Court has explained, "where [an] administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," the Court's "concern" for a clear statement from Congress "is heightened." *Solid*

Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 173 (2001).

Here, the OCC has promulgated a regulation that purports to divest States of their sovereign authority to enforce generally applicable state laws against national banks and their subsidiaries. The OCC concedes that national banks and their operating subsidiaries must comply with those state laws[4] — the laws are not expressly preempted, subject to field preemption, or in conflict with any federal law or policy.[5] Instead, the OCC claims that state attorneys general cannot enforce against national banks and their operating subsidiaries generally applicable laws that state legislatures retain authority to enact.[6]

As this Court held long ago: "To demonstrate the binding quality of a statute, but deny the power of enforcement[,] involves a fallacy made apparent by the mere statement of the proposition, for such power

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[4] *See* OCC C.A. Br. 37 (May 30, 2006).

[5] Accordingly, this case is very different from *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), where the question presented involved the preemption of state law. There, the Court applied conflict-preemption principles to hold that, "when state prescriptions significantly impair the exercise of [a national bank's] authority . . . under the [National Bank Act], the State's regulations must give way." *Id.* at 1567. Therefore, the national bank operating subsidiaries had no obligation to comply with those state laws.

[6] The dissent below aptly put it this way: "In the case at hand, . . . we have a federal executive official — the Comptroller of the Currency — usurping 'residual power reserved to the states.' Here, the power usurped is the police power to investigate certain national banks and their operating subsidiaries doing business in New York allegedly guilty of discriminatory lending practices in the state." Pet. App. 46a (quoting U.S. Const. amend. X).

is essentially inherent in the very conception of law." *First Nat'l Bank v. Missouri*, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds). Thus, a State's authority to enforce its own laws is an inherent sovereign power and a quintessential function of the State.

Indeed, "[e]ach [State] has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 U.S. 313, 320 (1978); *see Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("[T]he power to create and enforce a legal code, both civil and criminal[,] is one of the quintessential functions of a State.") (internal quotation marks omitted). These two powers — the power to create law and the power to enforce that law — are interdependent, for "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

Even assuming Congress has authority to preempt state enforcement of state laws, rather than state laws themselves — and neither the OCC nor the court below identified any other instance in which Congress has allowed States to pass laws that they may not enforce — Congress must speak expressly to so alter the federal-state balance of power. Congress cannot do so through implication, and federal agencies should not be assumed to have received such delegations of power to strip States of their enforcement authority. Accordingly, there is no basis in these circumstances for granting *Chevron* deference to the OCC's claim that the statute grants it such power. A fundamental prerequisite for the application of *Chevron* deference — the implicit delegation of authority to agencies to fill in statutory gaps — is

absent in this context. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); *id.* at 133 (recognizing that the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such . . . political magnitude to an administrative agency"); *cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").[7]

Although the court below appears to acknowledge the clear-statement rule that applies when Congress seeks to alter "an intrinsic aspect of state sovereignty," Pet. App. 11a, the court made no attempt to reconcile that rule with the fact that *Chevron* is invoked only when "'the statute is silent or ambiguous with respect to the specific issue,'" *id.* at 10a (quoting *Chevron*, 467 U.S. at 843). Instead, the court limited itself to analyzing the applicability of the presumption against preemption and the canon of constitutional avoidance. *See id.* at 11a-14a. Finding those doctrines inapplicable, the court concluded with essentially no explanation or justification that Congress's "expressed . . . intent" to preempt certain state laws meant that there was no "need for any further statement of intent" to preempt States from enforcing laws that are not preempted. *Id.* at

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[7] "[I]t is well established," the dissent below stated, "that an agency's construction of a statute that upsets the usual constitutional balance between federal and state powers is never entitled to deferential review under *Chevron*." Pet. App. 54a (citing *Solid Waste Agency*, 531 U.S. at 172).

14a. That conclusion is directly contrary to this Court's federalism decisions, which require a much clearer statement to divest States of their inherent authority to enforce their own laws. Moreover, allowing a federal agency to do so without express authorization from Congress blurs lines of political accountability to an even greater degree, which is in contravention of this Court's other federalism precedents. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) ("[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.") (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").[8] Put simply, the need for a clear statement from Congress in this context means that *Chevron* deference to the OCC's interpretation of 12 U.S.C. § 484(a) and promulgation of 12 C.F.R. § 7.4000 is, by definition, improper.

B. Congress Did Not Expressly Divest States Of Authority To Enforce Non-Preempted State Law, Nor Did It Expressly Delegate To The OCC The Power To Do So

The OCC has pointed to two statutory provisions as the source for its supposed power to strip States of authority to enforce the laws that they retain the

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[8] As the dissent below concluded, "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." Pet. App. 54a.

authority to enact.[9] Neither contains the type of express statement that would be necessary to withdraw from States the "power of enforcement" that is "essentially inherent" in their authority to enact laws that apply to national banks and their operating subsidiaries. *First Nat'l Bank*, 263 U.S. at 660.

First, the OCC has looked to the provisions of the National Bank Act that grant the Comptroller "visitorial powers" over national banks. 12 U.S.C. §§ 481, 484(a). The court below also relied on § 484(a). *See* Pet. App. 10a-32a. But there is nothing in this statutory provision that states — expressly or implicitly — that Congress intended for States to be able to pass laws with which national banks and their operating subsidiaries must comply, but that States would be powerless to enforce those laws when they are violated.

In particular, the term "visitorial powers" cannot be stretched to provide the necessary express statement of congressional intent. "Few ideas were more familiar in the formative era of the common law than that of visitation." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev.

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[9] The OCC also makes reference to its general rulemaking authority as the source of its power to restrict States from enforcing non-preempted state law. *See* 12 U.S.C. § 93a ("the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"). General rulemaking authority may mean that an agency receives *Chevron* deference for regulations that fall within its rulemaking authority, but it does not mean that Congress implicitly delegated to the agency the authority to pass any rule on any subject it wishes. Congress has not expressly authorized the OCC to strip States of enforcement authority over valid state laws, and therefore the fact that the OCC has rulemaking authority does not mean it had authority to promulgate a rule doing so.

369, 369 (1936). When Congress enacted the National Bank Act in 1864 and included the clause on "visitorial powers," *see* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116, it incorporated the common-law meaning of that term.[10]

As this Court has held, under the common law, "[v]isitation, *in law*, is the act of a superior or superintending officer, who visits a corporation to . . . enforce an observance of [the corporation's] laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (emphasis added). In other words, the term refers to the supervisory authority to examine the corporation's books and records, to oversee its management and internal affairs, and to monitor its compliance with its charter. *See id.* at 157-59. The Court reiterated the meaning of "visitorial powers" 19 years later, explaining that "the United States alone may inquire . . . whether a national bank is acting in excess of its charter powers, and . . . the state is wholly without authority to do so." *First Nat'l Bank*, 263 U.S. at 660; *see also Watters*, 127 S. Ct. at 1568-69. For nearly 150 years, Congress has not seen a need to amend the National Bank Act to alter the well-settled meaning of "visitorial powers." Numerous federal courts have confirmed the authority of state officials to enforce non-preempted state laws against national banks.[11]

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[10] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks and ellipses omitted).

[11] *E.g.*, *Jackson v. First Nat'l Bank*, 349 F.2d 71, 74-75 (5th Cir. 1965) (upholding a state banking superintendent's author-

Accordingly, when a State brings an enforcement action against a national bank for violations of valid, generally applicable, and non-preempted state anti-discrimination or consumer protection laws, it is not exercising "visitorial powers" over that bank, for it is not "endeavoring to call the bank to account for an act in excess of its charter powers"; instead, it is seeking "to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation." *First Nat'l Bank*, 263 U.S. at 660.[12] The dissent below understood that distinction. *See* Pet. App. 49a ("The state Attorney General has not expressed an interest in analyzing national banks' activities under their national banking charter, but instead is exercising his authority under the state's police power to investigate civil rights violations being committed by New York entities in New York."). The OCC's interpretation of "visitorial powers" to preclude state enforcement of all generally applicable state laws is flatly contrary to the settled meaning of that term.

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ity to bring suit for injunctive relief); *Nuesse v. Camp*, 385 F.2d 694, 699-705 (D.C. Cir. 1967) (same); *Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) ("[f]ederal law does not require that the OCC have exclusive enforcement" of state laws prohibiting fraud and deceptive trade practices against "national banks and their branches").

[12] The General Accounting Office (now the Government Accountability Office) ("GAO") similarly recognized the distinction between a "law enforcement" agency "focused on conducting investigations in response to consumer complaints and other information" and a "supervisory" officer like the Comptroller performing "routine monitoring and examination responsibilities." GAO, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending* 53 (2004), *available at* http://www.gao.gov/new.items/d04280.pdf.

At a minimum, Congress's use of "visitorial powers" cannot be understood to reflect an intent to divest States of their inherent, sovereign authority to enforce the laws they have the power to enact against those parties that are subject to — and violate — those laws.

Second, in promulgating § 7.4000, the OCC cited 12 U.S.C. § 1818 as a basis for its claim to exclusive authority to enforce valid, generally applicable state laws against national banks and their operating subsidiaries. That section authorizes the OCC to initiate cease-and-desist proceedings to remedy a violation of any "law, rule, or regulation." 12 U.S.C. § 1818(b). At least one court has read that section's terms to encompass violations of both state and federal laws.[13] Section 1818(b), however, simply authorizes the OCC to take enforcement actions when a national bank or an operating subsidiary violates an applicable state law. But it is one thing for Congress to authorize an agency to enforce state law and quite another to make the federal agency's authority exclusive, so as to preclude the progenitor of the law from enforcing it. Nothing in the text or legislative history of § 1818(b) suggests that Congress did anything more than authorize concurrent enforcement of state law.[14]

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[13] *See National State Bank v. Long*, 630 F.2d 981, 988 (3d Cir. 1980) ("[t]he legislative history of the Act indicates that Congress was concerned not only with federal but with state law as well").

[14] The court below did not address § 1818(b). And, in its brief below, the OCC made a passing reference to the section as the source of its authority to bring enforcement actions for violations of state law against national banks, but the OCC did not (because it cannot) make a serious argument that § 1818(b) authorizes it to preclude state enforcement of valid state laws.

If § 7.4000 were allowed to stand, it would have serious implications for the proper allocation of political accountability between the state and federal governments. By removing from state officials the power to enforce valid, generally applicable, non-preempted state laws, § 7.4000 raises the possibility that citizens will be uncertain and confused as to whom they should hold responsible for the enforcement of state laws against national banks.

II. THE OCC'S BUDGETARY INCENTIVES PROVIDE AN INDEPENDENT REASON TO VIEW ITS CLAIM OF AUTHORITY WITH SKEPTICISM RATHER THAN DEFERENCE

The OCC's budget comes primarily from assessments that it levies on those banks that have elected to operate under national charters. The OCC does not receive appropriations.[15] Instead, the Comptroller is given authority by statute to "impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office of the Comptroller." 12 U.S.C. § 482. Pursuant to this authority, the Comptroller levies a semiannual assessment on all nationally chartered banks. The size of the assessments is not based on the OCC's budgetary needs. Rather, assessments are based on a fixed fee schedule,[16] so the more banks with national charters, the larger the OCC's budget.[17] For fiscal year 2007, the OCC's total

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[15] *See* OCC, *Annual Report – Fiscal Year 2007*, at 70 (Nov. 2007) ("*OCC FY2007 Report*"), *available at* http://www.occ.gov/annrpt/2007AnnualReport.pdf.

[16] *See* 12 C.F.R. § 8.2(a) (highest assessment rates are paid by national banks with assets over $250 billion).

[17] *See generally* OCC, *Semiannual Assessment* (updated Feb. 19, 2008), *at* http://www.occ.gov/assess.htm.

budget amounted to $695.4 million, $666 million of which, or 95.8 percent, came from assessments on national banks.[18]

Because its budget depends on these assessments on national banks, the OCC has a strong incentive to promulgate rules and to operate in a manner that entices banks to obtain and maintain national charters, as opposed to state charters. Indeed, the OCC views itself as engaged in a competition with the States to convince banks to opt for national charters rather than state charters. The OCC has stated that the potential of losing regulatory "market share" to the state banking system was "'a matter of concern to us.'"[19] Accordingly, "the OCC has aggressively supported the preemption of state laws in order to keep national banks . . . from converting to state charters" — thereby reducing the OCC's resources — and to persuade state banks to adopt national charters.[20] As a former Comptroller acknowledged, the preemption of state regulatory authority "provides an incentive for banks to sign up with the OCC . . . . 'It is one of the advantages of a national charter, and I'm not the least bit ashamed to promote it.'"[21]

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[18] The remainder of the OCC's budget comes from investment income and bank licensing fees. *See OCC FY2007 Report* at 70 & table 9.

[19] Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1 (quoting Comptroller John D. Hawke, Jr.).

[20] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 2 (Feb. 12, 2002) ("Hawke Remarks"), *reprinted in* OCC News Release 2002-10, *available at* http://www.occ.treas.gov/ftp/release/2002-10a.doc.

[21] Bravin & Beckett, *supra* note 19, at A1 (quoting Comptroller Hawke).

Moreover, the OCC made clear from the outset that it intended for § 7.4000 and related regulations to serve as a marketing tool to attract state banks to adopt national charters, as the switch would free them from the prospect of state enforcement of applicable state laws. In a Notice of Proposed Rulemaking that delineated the several categories of preempted state laws, the OCC promoted the creation of "a 'complete' national banking system, free from state control, and subject to uniform, national standards."[22] The only way for there to be "uniform, national standards" is if the varying laws of the 50 States remain unenforced. The OCC has taken the possibility of operating under "uniform, national standards" (and the implicit promise to leave state laws unenforced) as a theme in its public pronouncements, emphasizing that one of the primary benefits of becoming a national bank is the freedom from state regulation. In the OCC's view, a "major advantage of the national charter" is the possibility "to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[23] A former Chairman of the Federal Deposit Insurance Corporation ("FDIC") came to the same conclusion in 2005, explaining that "[t]he facts of life today with regard to preemption are fairly simple. A state-chartered bank that wants to do business across state lines is at a substantial competitive disadvantage relative to a national bank."[24]

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[22] *Bank Activities and Operations; Real Estate Lending and Appraisals*, 68 Fed. Reg. 46,119, 46,129 (Aug. 5, 2003).

[23] Hawke Remarks at 2.

[24] Remarks by Donald E. Powell, Chairman, FDIC, Before the American Bankers Association Annual Convention at 2 (Sept.

The OCC's marketing efforts have been successful. In fiscal year 2005, the OCC recorded a 15 percent increase in assessment revenues.[25] The OCC openly attributed this revenue growth to "new large banks joining the national banking system" following the promulgation of regulations like § 7.4000.[26]

Given the possibility of freedom from state enforcement of state law, it is not surprising that many of the largest banks publicly supported the OCC's adoption of § 7.4000[27] and then converted from state to national charters thereafter.[28]

In short, even if *Chevron* deference to the OCC's adoption of § 7.4000 were appropriate, which it is not, as explained above, the OCC's budgetary self-interest provides an independent basis for viewing its interpretation of the National Bank Act with skepticism rather than the deference accorded under *Chevron*. *See Indiana Michigan Power Co. v. Depart-*

26, 2005), *available at* http://www.fdic.gov/news/news/speeches/archives/2005/chairman/spsept2605.html.

[25] OCC, *Annual Report – Fiscal Year 2005*, at 62 & table 9 (Oct. 2005) (reporting that the OCC's assessment revenues rose from $482.3 million in fiscal year 2004 to $557.8 million in fiscal year 2005), *available at* http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf.

[26] *Id.* at 62.

[27] *See* Todd Davenport, *Are States, OCC Near a Preemption Showdown?*, American Banker, Nov. 5, 2003, at 1 (reporting that, "[t]o nobody's surprise, large national banking companies such as Bank of America Corp., Wells Fargo & Co., Wachovia Corp., Bank One Corp., and National City Corp. wrote long comment letters" in support of the OCC's rulemaking proposal).

[28] Laura Thompson Osuri, *Trustmark of Miss. Sticking with OCC*, American Banker, Sept. 20, 2004, at 5 (reporting that J.P. Morgan Chase, HSBC, and Harris Bank had converted from state to national charters in 2004).

ment of Energy, 88 F.3d 1272 (D.C. Cir. 1996) (refusing to apply *Chevron* deference to a financially self-interested agency's interpretation of a statute). In comparable situations where there is a risk of agency self-interest — such as when an agency interprets a contract to which it is a party — courts routinely refuse to apply *Chevron*. *See Mesa Air Group, Inc. v. Department of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996) (holding that an agency's self-interested contractual interpretation did not deserve *Chevron* deference); *see also National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract."). For this reason as well, the court below erred in deferring under *Chevron* to the OCC's interpretation of the National Bank Act reflected in § 7.4000.

III. THE OCC'S DISPLACEMENT OF STATE ENFORCEMENT AUTHORITY REACHES WELL BEYOND THE BANKING INDUSTRY

As this Court has held, the OCC "has discretion to authorize [national banks to undertake] activities beyond those specifically enumerated" in the National Bank Act,[29] so long as they are among the "incidental powers . . . necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh).

In recent years, the OCC has read the "incidental powers" language extremely broadly, concluding that national banks and their operating subsidiaries can provide counseling to Medicare and Medicaid recipi-

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[29] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

ents,[30] sell long-term care and disability insurance,[31] operate roadside assistance programs,[32] act as finder of customers for automobile sales,[33] develop commercial buildings and manage residential condominiums in those buildings,[34] dispense prepaid alternate products (i.e., public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, promotional and advertising materials) from ATM machines,[35] operate a "virtual mall" where bank customers "can shop for a range of financial and non-financial products and services,"[36] and provide "Web design and development services."[37]

Under the OCC's view of its authority, States are precluded from enforcing valid, generally applicable laws against national banks and their operating subsidiaries engaged in all of those activities, and any others that the OCC may subsequently determine are "incidental" to the business of banking.[38]

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[30] OCC, *Activities Permissible for a National Bank, 2007*, at 5 (June 2008), *available at* http:www.occ.treas.gov/corpapps/BankAct.pdf.

[31] *Id.* at 6.

[32] *Id.* at 16.

[33] *Id.*

[34] *Id.* at 67-68.

[35] *Id.* at 52.

[36] *Id.* at 56.

[37] *Id.*

[38] Of keen concern to NAR, of course, is, as Justice Stevens suggested in *Watters*, that "[t]he Comptroller may well have the authority to decide whether the activities of a mortgage broker, *a real estate broker*, or a travel agent should be characterized as 'incidental' to banking, and to approve a bank's entry into those businesses." 127 S. Ct. at 1583 (Stevens, J., dissenting) (emphasis added).

Thus, although all other companies that offer roadside assistance programs, for example, are subject to state enforcement should they discriminate against stranded motorists, the national bank operating subsidiary is not. And the reality is that freedom from state enforcement may mean, as a practical matter, that national banks and their subsidiaries may be largely free from *any* effective enforcement, given significant competing demands on the OCC's attention, resources, and, indeed, enforcement skills with respect to such a wide range of activities governed by state law. Therefore, the practical effect of the OCC's expansive view of what constitutes "incidental powers" necessary to the "business of banking" is that the reach of § 7.4000 — and the divestiture of States' authority to enforce their own laws — is vast and goes well beyond traditional banking activities. The result threatens not only to preclude the uniform state enforcement of state laws across a wide range of industries, but, correspondingly, to prejudice seriously the interests of those consumers and other parties such state laws are designed to protect.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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AMICUS CURIAE BRIEF

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No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATES OF NORTH CAROLINA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Throughout this Nation's history, the States have exercised their police powers by promulgating and enforcing laws to protect consumers from abusive and unfair practices in the financial marketplace. Until the Office of the Comptroller of the Currency ("OCC") began its recent preemption crusade, national banks traditionally were subject to the States' consumer protection jurisdiction and the States were able to conduct investigations and to bring legal actions against national banks with minimal controversy.

The OCC's expansive interpretation of its visitorial powers under the National Bank Act, as upheld by the Second Circuit below, significantly limits this historic function of the States.[2] The Second Circuit's decision therefore is of great concern to the States, because it undermines core principles of federalism and interferes with the States' ability to enforce their own laws and to protect their own citizens. As noted by Judge Cardamone in his dissenting opinion, "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that

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[1] As required by Supreme Court Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of *amici curiae's* intention to file this brief.

[2] The States are unanimous in their support for the New York Attorney General's petition for a writ of certiorari: forty-nine States have joined in this amicus brief.

law, § 7.4000 [the OCC regulation at issue] erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 130-31 (2d Cir. 2007) (Cardamone, J., dissenting). The *amici* States are particularly concerned that this intrusion on their sovereign powers has been accomplished by administrative fiat, not by congressional action or independent statutory interpretation by the courts. Moreover, the current economic crisis, caused in large part by reckless subprime mortgage lending, has demonstrated the need for consumer protection and regulatory oversight in the area of mortgage lending.

REASONS FOR GRANTING THE PETITION

At the core of this case is whether the OCC's interpretation of the visitorial powers provision of the National Bank Act, 12 U.S.C. § 484, is entitled to substantial deference under the *Chevron* doctrine.[3] The *amici* States believe that resolution of this case requires independent judicial determination of sensitive legal issues relating to federal jurisdiction and state police powers. Responsibility for deciding such significant issues of federalism should not be

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[3] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ceded to the OCC, particularly given its self interest in the preemption of state laws and state enforcement rights.

The Second Circuit's deference to the OCC in this case pushes the *Chevron* doctrine beyond its intended and reasonable limits. The Second Circuit's application of *Chevron* will deprive States of the power to enforce their own valid laws and will cede to the OCC the exclusive right to enforce state laws with respect to national banks. Such a result represents a major alteration of the balance of power between federal and state authority and merits the attention of this Court.

THE SECOND CIRCUIT DECISION PUSHES *CHEVRON* DEFERENCE BEYOND ITS INTENDED LIMITS BY ALLOWING A FEDERAL AGENCY TO OVERRIDE THE SOVEREIGN POWERS OF THE STATES TO ENFORCE NONPREEMPTED STATE LAWS.

A. Introduction and Background.

The OCC regulation at issue, 12 C.F.R. § 7.4000, defines "visitorial powers" to include "[e]nforcing compliance with any applicable federal or state laws" relating to banking activities. 12 C.F.R. § 7.4000(a)(2)(iv) (2008). The regulation prohibits state officials from exercising any visitorial powers,

specifically including "inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions." 12 C.F.R. § 7.4000(a)(1) (2008).

The Second Circuit acknowledged that the OCC "expansively interpreted" the visitorial powers provision of the National Bank Act. 510 F.3d at 109. The relevant statute, 12 U.S.C. § 484(a), states, in pertinent part, that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice." The provision is contained in a subchapter of the Act entitled "Bank Examinations." 12 U.S.C. § 481 *et seq.* (2006). The surrounding sections of the subchapter cover other specific bank examination matters such as appointment and payment of examiners, special examinations, and waivers of examination requirements. 12 U.S.C. §§ 481-83, 485-86 (2006). Contrary to the OCC's expansive view, "visitorial powers" is a concept closely related to *regulatory examinations* of national banks consistent with the OCC's mission of ensuring the safety and soundness of the national banking system. *See Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (visitation is the "act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations").

The instant case arose when the New York Attorney General's Office ("NY AGO") began investigating allegations that high-rate mortgage loans were being made disproportionately to African-American and Hispanic homeowners in New York. As part of its investigation, the NY AGO sent "letters of inquiry" to banks requesting data relating to compliance with a New York fair lending law. Instead of cooperating with the NY AGO or initiating its own investigation into the alleged discriminatory practices, the OCC responded by filing a lawsuit to enjoin the NY AGO's investigation. The OCC acknowledged that the New York fair lending law was not substantively preempted but nevertheless took the position that any efforts by the Attorney General to enforce fair lending laws against national banks represented an unlawful exercise of visitorial powers. In other words, in the OCC's view, laws enacted by a state legislature and within the enforcement jurisdiction of a state attorney general can be enforced only if the OCC chooses to enforce them itself.

The District Court, deferring to the OCC regulation under the *Chevron* doctrine, found that the NY AGO's enforcement activities constituted "visitorial powers," and enjoined the Attorney General from investigating the national banks' residential lending practices. The Second Circuit, in a 2-1 decision, upheld the injunction. While granting *Chevron* deference to the OCC regulation, the Second Circuit

observed that the case was "at or near" *Chevron*'s "outer limits." 510 F.3d at 119. For the reasons set forth below, review of that decision is warranted.

B. The OCC's Visitorial Powers Regulation, Which Preempts Sovereign Enforcement Rights of the States, Is Not Entitled to Ordinary *Chevron* Deference.

The Second Circuit's decision in this case merits review by this Court because it extends *Chevron* deference to an unreasonable extreme. In deferring to the OCC's preemption ruling, albeit with misgivings, the Second Circuit erred in several significant respects. First, the court failed to apply the well-established presumption against preemption in areas of established state involvement. Second, the court failed to recognize the inappropriateness of *Chevron* deference in cases where sensitive issues of federalism are at stake. Third, the court erred by failing to consider the OCC regulation in its proper context of agency bias and a self-serving preemption agenda.

1. A Presumption Against Preemption Should Apply in this Case.

As a first step in its *Chevron* analysis, the Second Circuit considered whether a presumption against preemption applied to the OCC regulation. *See Rice v.*

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (assumption that historic police powers of the States not to be superseded without showing that such preemption "was the clear and manifest purpose of Congress"); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (the presumption against preemption is "crucial" when assessing the preemptive effect of an administrative regulation) (Stevens, J., dissenting). Despite acknowledging that there is a presumption against preemption in areas of traditional state authority, the Second Circuit found that the presumption did not apply in this case because the field of national bank regulation has been "substantially occupied by federal authority for an extended period of time." 510 F.3d at 113 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005), *cert. denied*, 127 S. Ct. 2093 (2007)).

The Second Circuit erred in its determination of this threshold question. Enforcement of nonpreempted state consumer protection laws is not a field that traditionally has been occupied by the Federal Government. In fact, as more fully argued below, enforcement of these laws has been primarily a state responsibility for many years. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (refusing to intrude upon States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers" without evidence of clear intent of Congress). While the OCC is the

primary regulator of national banks, the States' power to enforce their nonpreempted laws through legal actions against national banks has been recognized for many years. As Judge Cardamone pointed out in his dissent, "[c]onsiderable authority supports the proposition that states have the authority to enforce such laws against national banks." 510 F.3d at 129.

Further, the New York Attorney General was not intruding upon any areas of traditional federal regulation. He was not seeking to regulate or examine the safety and soundness of any national bank. Instead, the Attorney General exercised a traditional state law enforcement function by making a narrowly tailored request for information on banks' compliance with a valid and nonpreempted state law.

State enforcement of nonpreempted state law against national banks has been permitted by this Court since the enactment of the National Bank Act. In 1869, the Court observed that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869). In *First National Bank of St. Louis v. Missouri*, 263 U.S. 640 (1924), this Court held that the Missouri Attorney General could prosecute an action against a national bank to enforce a state law prohibiting branch banking. *Id.* at 659-60. The Court rejected the argument of the United States,

as *amicus curiae*, that the State's legal action was an attempt to exercise visitorial powers reserved to the Comptroller. *Id.* at 645. In *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 426 (1917), this Court held that the Michigan Attorney General could sue a national bank in state court to enforce state antitrust laws.

This, therefore, is the type of case in which the presumption against preemption should apply. If the presumption is properly applied, there should be minimal *Chevron* deference because, as the Second Circuit acknowledged, there is no unambiguous expression of congressional intent to displace state enforcement in § 484 of the National Bank Act. In fact, congressional intent appears to be to the contrary. *See* Conference Report for Riegle-Neal Interstate Branch Banking and Branching Efficiency Act of 1994, H.R. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (identifying "legitimate interest" of States in protecting consumers and disclaiming any intent to "weaken States" authority to protect the interests of their consumers, businesses, or communities"); *see generally Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (courts assume that Congress did not intend to supplant historic police powers of the States in the absence of clear congressional intent to the contrary).

2. Because Legal Analysis of Sensitive Issues of Federalism Is Required, Courts Should Interpret the Preemptive Effect of the Visitorial Powers Provision of the National Bank Act Without Deference to the OCC.

In this case, the Second Circuit struggled with whether to extend *Chevron* deference to the pertinent OCC regulation. The court noted that the OCC's preemption rule was based "almost entirely" on the agency's "interpretation of case law, legislative history, and statutory text." 510 F.3d at 118. The panel was troubled by the lack of evidence of administrative expertise in the OCC's rulemaking record:

> [T]he OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth. Indeed, there is very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*.

Id. at 119. However, despite these misgivings, the Second Circuit majority considered itself bound to uphold the OCC's rule under the *Chevron* framework.

As a number of commentators have observed, deference to an agency's legal analysis is particularly inappropriate when sensitive issues of federalism are involved. *See, e.g.*, Nina A. Mendelson, *Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008); Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 279 (1998) (noting that "it is highly problematic to assert that agencies have expertise in determining the proper balance between federal and state power"); Recent Cases, *Federal Preemption – Chevron Deference – Second Circuit Finds National Bank Operating Subsidiary Exempted From State Law – Wachovia Bank v. Burke*, 119 HARV. L. REV. 1598, 1601 (2006) (observing that recent scholarly literature "has called into question whether *Chevron's* rationales retain much persuasive force in preemption contexts" and noting that "when preemption issues arise, agencies lose much of their expertise advantage relative to courts").

This Court has questioned, but has not resolved, whether, absent a clear statement of congressional intent, *Chevron* deference is due to an agency interpretation of a federal statute's preemptive effect. In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), the Court assumed, but declined to decide, that the preemptive effect of a statute must be

determined *de novo* by the courts. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), Justice O'Connor stated that "[i]t is not certain that an agency regulation determining the pre-emptive effect of any federal statute is entitled to deference." 518 U.S. at 512 (O'Connor, J., concurring in part and dissenting in part). Most recently, in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559, 1572 (2007), the Court found it unnecessary to decide whether another OCC preemption regulation was entitled to *Chevron* deference. The dissenting justices in *Watters* noted, however, that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 127 S. Ct. at 1584 (dissenting opinion of Stevens, J., joined by Roberts, C.J. and Scalia, J.).

This Court has expressly declined to grant *Chevron* deference where doing so could implicate serious constitutional and federalism issues. In *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court articulated an "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. The Court went on to note that its concern "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173.

Under the OCC regulation at issue, the Federal Government is the only entity that can enforce state laws with respect to national banks. Placing the enforcement and administration of state laws exclusively in the hands of the Federal Government severely strains principles of federalism and raises Tenth Amendment issues. As this Court has repeatedly emphasized, the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997); *see also New York v. United States*, 505 U.S. 144, 168 (1992) (cautioning against federal control that diminishes the accountability of state government to its citizens).

The OCC regulation undermines such accountability. Under 12 C.F.R. § 7.4000, the Federal Government has supplanted the States as the enforcer of state laws. Such a radical departure from the traditional balance between the role of the Federal Government and the role of the States should only occur when Congress has clearly expressed its intent to do so. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Such an unequivocal expression of intent cannot be found to support 12 C.F.R. § 7.4000.

Whether or to what extent *Chevron* deference is due to agency preemption determinations is an important issue that should be resolved by this Court. Lower court decisions have not been uniform. As one

commentator has noted, in assessing agency interpretations of a statute's preemptive effect, lower courts "have wavered between applying only *Chevron* and interpreting a statute *de novo* notwithstanding an agency interpretation, following *Rice*." Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 740 (2004).

In the States' view, a federal agency is not the proper forum for resolving conflicts between federal and state authority. Federal agencies lack the expertise to properly weigh federalism concerns. Agency preemption determinations naturally will be affected by agency self-interest and institutional bias. Further, as the recent example of the OCC has shown, there is a clear risk that agencies will tend to claim exclusive regulatory and enforcement authority with the deliberate intent of minimizing existing state authority.

3. In View of the OCC's Self-Interest in Preempting State Law, the Courts Should Not Give *Chevron* Deference to the OCC's Preemption Rulings.

The OCC regulation at issue should be given even less deference under *Chevron* when viewed against the backdrop of the agency's unabashed self-interest in preempting state law to attract large national banks to its constituency. The OCC's self-interested

rulemaking is not the kind of impartial and disinterested rulemaking contemplated under *Chevron*. *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 265 (2004) (observing that the *Chevron* approach "presupposes that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority"); Ernest Gellhorn & Paul Verkuil, *Delegation What Should We Do About It? Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1009 (1999) (maintaining that agency interpretations of statutes that implicate "agency self-interest" – either by advancing the agency's financial interests or by expanding the scope of its regulatory powers – should not receive *Chevron* deference and should be reviewed *de novo* by the courts).

In a speech given on February 12, 2002, then Comptroller John Hawke conceded that promotional considerations were a factor in the OCC's preemption push. Specifically, Comptroller Hawke observed: "The ability of national banks to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities, is a major advantage of the national charter." John Hawke, Jr., Remarks to Women in Housing and Finance (Feb. 12, 2002), *reprinted in* OCC News Release 2002-10, at 2, available at http://www.occ.gov/ftp/release/2002-10a.doc.

The OCC's constituent banks strongly supported the OCC's preemption rules, and "the OCC's preemption initiatives are widely viewed by commentators as serving the interests of big, multistate national banks." *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 276 (2004). The OCC has a "strong incentive" to persuade major banks to retain or convert to national charters because the OCC's budget is almost entirely funded by fees paid by national banks. *Id.* By promoting a regime of *de facto* field preemption for national banks, the OCC is "clearly encouraging large multistate banks to select national charters for the purpose of avoiding the application of state laws, except for those helpful state laws that [support those banks.]" *Id.* at 276-77.

The OCC regulation at issue here should not be viewed in isolation. It is part of a campaign by the OCC to use its regulatory and rulemaking authority to preempt state consumer protection laws as well as state enforcement with respect to national banks. *See, e.g.*, Preemption Determination, OCC Docket No. 01-10, 66 Fed. Reg. 28,593 (May 23, 2001) (preempting States from applying their consumer protection laws to non-bank agents, such as motor vehicle dealers, who originate loans for national banks); Preemption Determination and Order, OCC

Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003) (preempting state predatory mortgage lending laws); 12 C.F.R. § 7.4008(d) (2008) (preempting virtually all state consumer protection laws relating to lending activities, under the theory that such laws "obstruct, impair or condition" the ability of national banks to engage in consumer lending). These actions by the OCC are part and parcel of a regulatory agenda that has been anything but impartial and free of self-interest.

C. The Question Presented in the Petition was Left Open by *Watters v. Wachovia Bank.*

In deciding that the presumption against preemption did not apply, the Second Circuit relied in part on this Court's recent decision in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559 (2007). While conceding that *Watters* did not directly address the ultimate issue before it, the court read the *Watters* decision to *imply* that investigation and enforcement by state officials could constitute visitorial authority. 510 F.3d at 116 (citing *Watters*, 127 S. Ct. at 1568-69).

The Second Circuit's reliance on *Watters* is misplaced. Although *Watters* dealt with the OCC and a preemption issue, it was a very different case from the one at bar. *Watters* did not construe the meaning

of visitorial powers and did not resolve the issue of whether *Chevron* deference should be accorded to the OCC in a preemption ruling. In *Watters*, the question was whether operating subsidiaries of national banks have the same status as the banks themselves for purposes of a preemption analysis. There was no dispute in *Watters* with respect to whether Michigan's mortgage lender licensing scheme constituted an exercise of visitorial powers. By contrast, the preemption issue here does not relate to traditionally visitorial licensing, supervision and examination activities, but to state enforcement of nonpreempted state laws governing discrimination in the pricing of credit.

The enforcement authority of a state attorney general typically differs from the core supervisory authority of a state banking commissioner. The state banking supervisor in *Watters* licensed and examined state-chartered financial institutions pursuant to a regulatory regime. Unlike a banking supervisor, an attorney general usually does not oversee banking operations on a routine or systematic basis. Instead, state attorneys general typically have authority to enforce state laws of general application, such as consumer protection laws, and conduct investigations only when there is good cause to believe those laws have been violated.

Moreover, the *Watters* decision was based on the court's direct interpretation of language in the National Bank Act, not on *Chevron* deference to the disputed OCC regulation concerning operating subsidiaries of national banks. The majority opinion in *Watters* expressly declined to consider the scope of administrative preemption authority, although the circuit court had decided the case based on *Chevron* deference. 127 S. Ct. at 1572 n.13. While the majority in *Watters* left this issue open, the dissenting justices made clear their view that *Chevron* deference is not warranted with respect to preemptive regulations. *Id.* at 1584 (dissenting opinion of Stevens, J., joined by Roberts, C.J. and Scalia, J.).

D. Deference to the OCC's Interpretation of Visitorial Powers will Deprive the States of Their Historic Role in Enforcing State Consumer Protection and Fair Lending Laws Against National Banks.

State attorneys general have an established history of enforcing state consumer protection laws, and national banks have received their share of attention. Many of these actions resulted in settlements or assurances of voluntary compliance without banks asserting that the actions were "visitorial" or subject to the exclusive enforcement

jurisdiction of the OCC.[4] As Judge Cardamone noted in his dissent, "virtually from the inception of the National Bank Act the term [visitorial powers] was not understood to preclude state enforcement of nonpreempted state laws." 510 F.3d at 129. In fact, until recently, most banks cooperated in the resolution of these actions without interference from the OCC. These attorney general actions, which benefitted consumers and promoted fair business practices in the banking industry, have not threatened or interfered with the OCC's enforcement authority and have not significantly interfered with the lawful operations of national banks.

In some cases, in order to obtain relief for victims of fraudulent practices by retail sellers, attorneys general must pursue the banking institutions that financed the questionable transactions. As the West

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[4] For examples of reported cases involving state attorney general actions against national banks, *see, e.g., State of Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *Attorney General v. Michigan Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981), *rev'd on other grounds*, 325 N.W.2d 777 (Mich. 1982); *State of New York v. Citibank, N.A.*, 537 F. Supp. 1192 (S.D.N.Y. 1982); *State of Arizona v. Sgrillo*, 859 P.2d 771 (Ariz. Ct. App. 1993); *State of Wisconsin v. Ameritech Corp.*, 517 N.W.2d 705 (Wis. Ct. App. 1994); *State of West Virginia v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995); *State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001).

Virginia Supreme Court noted in allowing that State's attorney general to maintain an action against a national bank that financed the allegedly unlawful sale of motor vehicle extended warranties:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the CCPA [the state consumer protection act] did not include lawsuits against financial institutions such as defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumers protection would be stripped of its efficacy.

State of West Virginia v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 526 (W. Va. 1995).

Despite the continuing need for consumer protection oversight, the OCC has increasingly hardened its position against state enforcement in the past few years. National banks can regularly rely on OCC support for their preemption arguments against state officials. For example, in 2001, the Minnesota Attorney General brought suit in federal court against Fleet Mortgage Corporation for allegedly deceptive telemarketing practices. Fleet Mortgage, a national bank subsidiary, argued that only the OCC could

enforce state consumer protection laws against it and was supported by an OCC amicus brief. The District Court rejected Fleet's motion to dismiss, holding that "[f]ederal law does not require that the OCC have exclusive enforcement over such actions." *State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001).

Prior to the OCC's recent assertion of exclusive enforcement authority, the OCC had minimal interest in consumer protection.[5] As subprime mortgage lending abuses became epidemic, the OCC and other banking regulators were criticized for their slow response. *See* Edmund L. Andrews, *Fed Shrugged as Subprime Crisis Spread*, N.Y. TIMES, Dec. 18, 2007, at 1; Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown – States, Federal Agencies Clashed on Subprimes as Market Ballooned*, WALL ST. J., Mar. 22, 2007, at A1. By contrast, States were enacting predatory lending laws and pursuing major national lenders for predatory

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[5] The OCC's record in enforcing consumer protection laws against national banks has been described as "relatively lax" and "unimpressive," particularly when compared to the more vigorous enforcement efforts of state authorities. Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMPLE L. REV. 1, 70-74, 77-81 (2005).

lending practices.[6] Efforts by state attorneys general to persuade the OCC to temper its preemption zeal were unavailing. *See* Robert Berner & Brian Grow, *They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington*, BUSINESS WEEK, Oct. 20, 2008, at 36.

The power to create and enforce laws, both criminal and civil, is "one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986); *see also United States v. Wheeler*, 435 U.S. 313, 320 (1978) (affirming that a State "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses"). The States have exercised their police powers against national banks for over a hundred years. This essential sovereign enforcement power to enforce nonpreempted state laws will be ended if the OCC's preemption fiat is upheld.

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[6] *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 316 (2004); Paul Beckett & Joseph T. Hallinan, *Household May Pay $500 Million Over 'Predatory' Loan Practices*, WALL ST. J., Oct. 11, 2002, at A1.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

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(9)

No. 08-453

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IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 3, 2008
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IN THE UNITED STATE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The Clearing House Association, L.L.C.,

Plaintiff

v.

Eliot Spitzer, Attorney General of the State of New York,

Defendant

No. 1:05-cv-05629-SHS

RELEVANT DOCKET ENTRIES

No.	Date	General Description
1	06/16/2005	COMPLAINT against Eliot Spitzer. (Filing Fee $ 250.00, Receipt Number 546761) Document filed by The Clearing House Association, L.L.C.. (jbe,) Additional attachment(s) added on 6/20/2005.

. . . .

—	06/17/2005	Minute Entry for proceedings held before Judge Lawrence M. McKenna : Show Cause Hearing held on 6/17/2005. Attorneys' Robinson B. Lacy and Adam R. Brebner present for Plaintiff. Atty. Douglas B. Jordan present. Counsel Dennis D. Parker, Bureau Chief, Civil Rights Division, Thomas G. Conway, Bureau Chief, and Dietrich L. Snell, Deputy Atty. General all present for State of New York Defendant. Court Reporter: Karen Gorlaski present. Motion hearing held on June 17. 2005 of Plaintiff's Motion, by Order to Show Cause, filed on June 17, 2005, for a preliminary injunction enjoining the Defendant from issuing subpoenas for information or other action to enforce federal and state discrimination-in-lending laws against the national banks that are members of The Clearing House Association, L.L.C., or

		otherwise exercising visitorial powers with respect to those banks and operating subsidiaries in violation of 12 U.S.C. 484. Judge's Decision: Court grants temporary TRO pending next conference scheduled before Judge Sidney H. Stein, U.S. District Judge, on Monday, June 20, 2005 at 3:30pm in Courtroom 23A, 500 Pearl Street. See transcript. So Ordered, McKenna, J.
....		
3	06/20/2005	ORDER TO SHOW CAUSE for an order, for preliminary injunction, enjoing defendants, his agents, etc. pending the entry of a final judgment and decree in this action.
....		
6	06/21/2005	MEMORANDUM OF LAW in Support re: 3 Order to Show Cause for Preliminary Injunction and Temporary

		Restraining Order. Document filed by The Clearing House Association, L.L.C..
7	06/27/2005	TRANSCRIPT of proceedings held on 6/20/2005 @3:45pm before Judge Sidney H. Stein.
8	07/06/2005	ORDER: defendants' answers to the complaints and responses to plaintiffs' applications for preliminary injunctions are due by 8/5/05; plaintiffs' replies are due by 8/19/05; oral argument will be scheduled during the week of 8/29/05. The trials on the merits in the cases are consolidated with the hearings on the preliminary injunction applications pursuant to Rule 65 of the FRCP.
....		
10	07/13/2005	TRANSCRIPT of proceedings held on 7/5/05 before Judge Sidney H. Stein.

11	07/29/2005	ORDER. In light of the fact that these actions turn on purely legal issues, the resolution of which will not be assisted by the requested discovery, even under the broad standard set forth in Rule 26 of the FRCP, the Attorney General's request for certain discovery is denied
. . . .		
13	08/05/2005	MOTION to File Amicus Brief. Document filed by NAACP Legal Defense & Educational Fund, Inc..
14	08/05/2005	ANSWER to Complaint. Document filed by Eliot Spitzer.
15	08/05/2005	OPPOSITION BRIEF re: 3 Order to Show Cause, 6 Memorandum of Law in Support. Document filed by Eliot Spitzer.
16	08/05/2005	FILING ERROR - DEFICIENT DOCKET ENTRY - DECLARATION

		of Dennis D. Parker in Opposition re: 3 Order to Show Cause, 6 Memorandum of Law in Support. Document filed by Eliot Spitzer. (Attachments: # 1 Exhibit # 2 Exhibit)(Parker, Dennis) Modified on 8/18/2005
17	08/05/2005	DECLARATION of Thomas G. Conway in Opposition re: 3 Order to Show Cause, 6 Memorandum of Law in Support. Document filed by Eliot Spitzer.
18	08/08/2005	ORDER granting 13 Motion to File Amicus Brief. The motion is hereby granted and the brief amicus curiae attached to the Motion is hereby accepted for filing. So Ordered.
. . . .		
21	08/12/2005	DECLARATION of Dennis D. Parker (AMENDED) in Opposition re: 3 Order to Show Cause, 6 Memorandum

		of Law in Support. Document filed by Eliot Spitzer.
22	08/12/2005	ORDER granting 20 Motion to File Amicus Brief. The Motion of State Attorneys General for Leave to File Brief Amicus Curiae filed on 8/11/05, is granted. So Ordered.
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29	08/19/2005	BRIEF re: 3 Order to Show Cause (Reply Memorandum). Document filed by The Clearing House Association, L.L.C..
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32	08/23/2005	ENDORSED LETTER addressed to Judge Sidney H. Stein from Anthony D. Boccanfuso dated 8/16/05 re: granting American Bankers Association, the Consumer Bankers Association and the Financial Services Roundtable leave to file 25 page brief.

33	09/19/2005	TRANSCRIPT of proceedings held on 9/7/2005 before Judge Sidney H. Stein.
34	10/12/2005	OPINION AND ORDER For the reasons set forth above, the Clearing House's appliclation for permanent injunctive relief is granted. Plaintiff is entitled to the injunctive relief provided in OCC v. Spitzer for the reasons set forth in the Opinion and Order in that action dated 10/12/05. In addition, because an action brought in the state's parens patriae capacity to enforce the Fair Housing Act's fair lending provisions against the Clearing House nation bank members or their operating subsidiaries constitutes a form of visitorial authority prohibited by section 484(a) of the National Bank Act, and is not authorized by federal law, the New York State Attorney General is enjoined from instituting any

		judicial action premised on the state's parens patriae authority to enforce the Fair Housing Act's fair lending provisions against the Clearing House's national bank members or their operating subsidiaries.
35	11/04/2005	JUDGMENT and DECREE that the attorney general of NYS is permanently enjoined from issuing subpoenas, institutng actions etc. against the Clearing House.
36	11/07/2005	NOTICE OF APPEAL from 34 Memorandum & Opinion, Terminate Motions. Document filed by Eliot Spitzer. Filing fee $ 255.00, receipt number E 560396.
37	06/20/2008	MANDATE of USCA (Certified Copy) as to 36 Notice of Appeal filed by Eliot Spitzer USCA Case Number 05-5996-cv (L) and 05-6001-cv (Con). Ordered, Adjudged and Decreed that the judgment of the District Court is AFFIRMED IN

		PART, VACATED IN PART and REMANDED IN PART with instructions in accordance with the opinion of this court. Catherine O'Hagan Wolfe, Clerk USCA. Issued As Mandate: 6/17/2008.
38	06/23/2008	ORDER: The Second Circuit remanded the case to this Court with instruction to dismiss that claim. The clearing House Association, L.L.C. v. Cuomo. 510 f.3d 105, 126 (2d Cir. 2007). The mandate of the Second Circuit in this action on June 17, 2008. Accordingly, the FHA claim is hereby dismissed for lack of jurisdiction.

[Further Entry Omitted]

IN THE UNITED STATE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Office of the Comptroller of the Currency,

Plaintiff-Counter-Defendant

v.

Eliot Spitzer, in his official capacity as Attorney General for the State of New York,

Defendant-Counter-Claimant

1:05-cv-05636-SHS

RELEVANT DOCKET ENTRIES

No.	Date	General Description
1	06/16/2005	COMPLAINT against Eliot Spitzer. Document filed by Office of the Comptroller of the Currency. (jeh,) Additional attachment(s) added on 6/23/2005
2	06/16/2005	MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. (proposed order attached)

		Document filed by Office of the Comptroller of the Currency. (jeh,) Additional attachment(s) added on 7/1/2005
3	06/16/2005	DECLARATION of Grace E. Dailey. Document filed by Office of the Comptroller of the Currency. (jeh,) Additional attachment(s) added on 7/1/2005
4	06/16/2005	MEMORANDUM OF LAW in Support re: 2 MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. Document filed by Office of the Comptroller of the Currency.
5	06/20/2005	NOTICE of Related Case. Document filed by Office of the Comptroller of the Currency.
6	06/21/2005	NOTICE OF CASE REASSIGNMENT to Judge Sidney H. Stein. Judge Loretta A. Preska no longer assigned to the case.

. . . .

10	07/06/2005	ORDER: defendants' answers to the complaints and responses to plaintiffs' applications for preliminary injunctions are due by 8/5/05; plaintiffs' replies are due by 8/19/05; oral argument will be scheduled during the week of 8/29/05. The trials on the merits in the cases are consolidated with the hearings on the preliminary injunction applications pursuant to Rule 65 of the FRCP.
11	07/13/2005	TRANSCRIPT of proceedings held on 7/5/05 before Judge Sidney H. Stein.
....		
13	07/29/2005	ORDER. In light of the fact that these actions turn on purely legal issues, the resolution of which will not be assisted by the requested discovery, even under the broad standard set forth in

		Rule 26 of the FRCP, the Attorney General's request for certain discovery is denied
. . . .		
15	08/05/2005	MOTION to File Amicus Brief. Document filed by NAACP Legal Defense & Educational Fund, Inc.. (Attachments: # 1 Proposed Amicus Brief of National Community Reinvestment Coalition, et al.)
16	08/05/2005	ANSWER to Complaint. COUNTERCLAIM against Office of the Comptroller of the Currency. Document filed by Eliot Spitzer.
17	08/05/2005	MEMORANDUM OF LAW in Opposition re: 2 MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. Document filed by Eliot Spitzer, Eliot Spitzer.

18	08/05/2005	FILING ERROR - DEFICIENT DOCKET ENTRY - DECLARATION of Dennis D. Parker in Opposition re: 2 MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. Document filed by Eliot Spitzer, Eliot Spitzer. (Attachments: # 1 Exhibit # 2 Exhibit)(Parker, Dennis) Modified on 8/18/2005
19	08/05/2005	DECLARATION of Thomas G. Conway in Opposition re: 2 MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. Document filed by Eliot Spitzer, Eliot Spitzer.
20	08/08/2005	ORDER granting 15 Motion to File Amicus Brief. The motion is hereby granted and the brief amicus curiae attached to the Motion is hereby accepted for filing. So Ordered. (Signed by Judge Sidney H. Stein on 8/8/05)

21	08/10/2005	ORDER: the Motion of the National Association of Realtors and New York State Association of Realtors, Inc. for leave to file memorandum of law as Amici Curiae is GRANTED.
. . . .		
23	08/11/2005	MOTION to File Amicus Brief. Document filed by Roy Cooper. (Attachments: # 1 Brief Amicus Curiae of State Attorneys General in Opposition to Plaintiffs' Motions for a Preliminary and Permanent Injunction)
25	08/12/2005	DECLARATION of Dennis D. Parker (AMENDED) in Opposition re: 2 MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. Document filed by Eliot Spitzer, Eliot Spitzer.
28	08/12/2005	ORDER granting 23 Motion to File Amicus Brief. The Motion of State Attorneys

		General for Leave to File Brief Amicus Curiae filed on 8/11/05, is granted. So Ordered.
....		
31	08/19/2005	REPLY MEMORANDUM OF LAW in Support re: 2 MOTION (FILED ON SERVICE DATE) for Preliminary Injunction. Document filed by Office of the Comptroller of the Currency, Office of the Comptroller of the Currency.
32	08/23/2005	MOTION to File Amicus Brief. Document filed by National Association of Realtors and New York State Association of Realtors, Inc..
....		
—	09/19/2005	TRANSCRIPT of proceedings held on 9/7/2005 before Judge Sidney H. Stein.

36	10/04/2005	REPLY re: 16 Answer to Complaint, Counterclaim. Document filed by Office of the Comptroller of the Currency.
37	10/12/2005	OPINION AND ORDER Because 12 C.F.R. 7,4000 is a reasonable interpretation of the National Bank Act, and because the Attorney General's investigation into national banks' residential mortgage lending activities is prohibited by that regulation, the OCC is entitled to a declaratory judgment that: (1) the Attorney General of the State of New York cannot enforce state fair lending laws against national banks or their operating subsidiaries; (2) the Attorney General cannot compel compliance with a state investigation into potential violations in connection with the residential mortgage lending practices of those banks except as authorized by federal law; and (3) the

courts of justice exception to section 484 does not provide an exception permitting the Attorney General to enforce state or federal fair lending laws through judicial actions. Because the Attorney General's assertion of visitorial authority impermissibly interferes with the OCC's exclusive supervisory role, the OCC's application for injunctive relief pursuant to Fed. R. Civ. P. 65 is granted. The Attorney General for the State of New York, and all those acting under his direction or in concert with him, are permanently enjoined from issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement action to compliance with the Attorney General's already existing informational demands; and from

		instituting actions in the courts of justice against national banks to enforce state fair lending laws. (Signed by Judge Sidney H. Stein on 10/12/05)
38	11/07/2005	NOTICE OF APPEAL from 37 Memorandum & Opinion, Terminate Motions. Document filed by Eliot Spitzer. Filing fee $ 255.00, receipt number E 560395.
39	11/28/2005	JUDGMENT AND DECREE in favor of plaintiff. (Signed by Judge Sidney H. Stein on 11/28/05)

[Further Entries Omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Clearing House Association,

Plaintiff-Appellee

v.

Eliot Spitzer,

Defendant-Appellant

No. 05-5996cv
(consolidated with No. 05-6001cv)

RELEVANT DOCKET ENTRIES

Date	General Description
11/7/05	Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court).
11/8/05	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Eliot Spitzer, filed. Filing fee paid, receipt # E 560396.

. . . .

11/22/05	Appellant Eliot Spitzer motion consolidate appeals filed with proof of service.
. . . .	
12/2/05	Order FILED GRANTING motion to consolidate appeals 05-5996-cv(L) & 05-6001-cv(CON) by Appellant Eliot Spitzer, endorsed on motion dated 11/22/2005.
. . . .	
3/27/06	APPELLANT Eliot Spitzer, brief FILED with proof of service.
3/27/06	APPELLANT Eliot Spitzer, joint appendix filed w/pfs.
3/27/06	APPELLANT Eliot Spitzer, special appendix filed(w/pfs)
. . . .	
4/4/06	AMICUS CURIAE State Attorneys General, brief filed with proof of service.
. . . .	
4/7/06	AMICUS CURIAE National Association of Realtors, brief filed with proof of service.

4/7/06	AMICUS CURIAE Lawyers' Committee for Civil Rights Under Law, brief filed with proof of service.
....	
4/27/06	AMICUS CURIAE Center for Responsible Lending, brief filed with proof of service.
....	
5/26/06	APPELLEE The Clearing House Association, brief filed with proof of service.
....	
5/31/06	APPELLEE Office of the Comptroller of the Currency, brief filed with proof of service.
....	
6/9/06	AMICUS CURIAE American Bankers Association, brief filed with proof of service.
....	
6/13/06	APPELLANT Eliot Spitzer, reply brief filed with proof of service.
....	

7/10/06	APPELLEE Office of the Comptroller of the Currency, 28(J) letter dated 7/6/06 from Douglas B. Jordan, Esq., received.
. . . .	
11/27/06	APPELLEE Office of the Comptroller of the Currency, 28(J) letter received.
. . . .	
12/4/06	Case heard before CARDAMONE, PARKER, C.JJ; KOELTL, D.J
. . . .	
4/20/07	APPELLEE The Clearing House Association, 28(J) letter dated 4/20/07 endorsed Robinson B. Lacy, Esq., received.
4/24/07	APPELLEE Office of the Comptroller of the Currency, 28(J) letter dated 4/23/07 from Douglas B. Jordan, Esq., received.
5/15/07	Letter dated 5/11/07 from Michelle Aronowitz, Esq., responding to appellees 28(j) letters, received
12/4/07	Judgment of the district court is AFFIRMED in part, VACATED in part and REMANDED by published signed opinion filed.

12/4/07	Judge CARDAMONE Concurring in part and dissenting in part, in a separate opinion, filed.
12/4/07	Judgment filed.
. . . .	
2/8/08	Appellant Eliot Spitzer Petition for rehearing and petition for rehearing en banc filed with proof of service.
. . . .	
2/19/08	Amicus Curiae Center for Responsible Lending, brief in support of the Petition for rehearing & petition for rehearing en banc filed with proof of service.
2/25/08	Order filed stating "It is ORDERED that Plaintiff-Appellees The Clearing House Association, LLC and the Office of the Comptroller of the Currency respond within thirty days of the date of this order to the Petition for Rehearing En Banc filed in this case." Before RJC, BDP, CJJ, JGK, DJ.
. . . .	

3/26/08	Appellee The Clearing House Association, opposition to the Petition for rehearing & petition for rehearing en banc, filed with proof of service.
3/26/08	Appellee Office of the Comptroller of the Currency, opposition to the Petition for rehearing & petition for rehearing en banc, filed with proof of service.
. . . .	
4/3/08	AMICUS CURIAE American Bankers Association, opposition to the petition for rehearing with proof of service FILED.
. . . .	
6/5/08	Order FILED DENYING motion Petition for rehearing by Appellant Order FILED DENYING motion petition for rehearing en banc by Appellant. "Appellant Andrew M. Cuomo, having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panle rehearing, and the active members of the Court having considered the request for rehearing en banc, IT IS HEREBY ORDERED that the petition is denied." For the Court, by FP, Deputy Clerk.
. . . .	

6/17/08	Judgment MANDATE ISSUED. CLOSED
6/24/08	APPELLEE The Clearing House Association, statement of costs taxed in the amount of $381.50 filed.

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Office fo the Comptroller of the Currency,

Plaintiff-Counter-Defendant-Appellee

v.

Eliot Spitzer,

Defendant-Counter-Claimant-Appellant

No. 05-6001cv
(consolidated with No. 05-5996cv)

RELEVANT DOCKET ENTRIES

Date	General Description
11/8/05	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Eliot Spitzer, filed. Fee paid $255 Receipt# E560395.
. . . .	
11/8/05	Index in lieu of Record on Appeals Electronically Filed (Original documents remain in the originating court).

11/22/05	Appellant Eliot Spitzer motion to consolidate appeals filed with proof of service.
. . . .	
12/2/05	Order FILED GRANTING motion to consolidate appeals 05-5996-cv(L) & 05-6001-cv (CON) by Appellant Eliot Spitzer, endorsed on motion dated 11/22/2005.
. . . .	
12/4/06	Case heard before CARDAMONE, PARKER, C.JJ; KOELTL, D.J
12/4/07	Judgment of the district court is AFFIRMED in part, VACATED in part and REMANDED by published signed opinion filed.
12/4/07	Judge Cardamone concurrs in part and dissents in part, in a separate opinion, filed.
12/4/07	Judgment filed.
6/17/08	Judgment MANDATE ISSUED. CLOSED

H. Rodgin Cohen (HC7168)
Gandolfo V. DiBlasi (GD5913)
Michael M. Wiseman (MW3209)
Robinson B. Lacy (RL8282)
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125 Broad Street,
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 5269(SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

v.

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant.

COMPLAINT

Plaintiff, The Clearing House Association, L.L.C. (the "Clearing House"), alleges:

SUMMARY OF THE ACTION

1. The National Bank Act provides, "No national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U.S.C. § 484(a). The Office of the Comptroller of the Currency (the "OCC") has issued regulations interpreting this statute to mean that "State officials may not . . . conduct[] examinations, inspect[] or require[] the production of books or records of national banks, or prosecut[e] enforcement actions [against national banks], except in limited circumstances authorized by federal law." 12 C.F.R. § 7.4000(a)(1). Despite this clear federal law, the Defendant has commenced inquiries into the lending activities of several national banks and threatened to subpoena or bring enforcement proceedings against these banks. In this action, the Clearing House seeks injunctive relief on behalf of its members that are federally chartered national banks, and their operating subsidiaries, against the Defendant's actions in violation of the National Bank Act and the regulations promulgated by the OCC.

2. The Clearing House does not challenge the authority of the Defendant over other companies that are not chartered by the federal government. Nor does the Clearing House assert that the Defendant has been unreasonable or unfair in his enforcement efforts against such other companies. Rather, this action presents a purely legal issue regarding the primacy of federal law with respect to national banks.

JURISDICTION AND VENUE

3. This is an action under the National Bank Act, 12 U.S.C. § 21 *et seq.* The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under the laws of the United States.

4. Venue in this district is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred in this district. In particular, the Defendant's letters requesting documents from the national banks originated from the Defendant's executive office in this district and two of the three letters at issue were addressed to offices of banks within this district.

THE PARTIES

5. The Clearing House is an association of leading commercial banks, organized as a limited liability company under Delaware law, with its main office at 100 Broad Street, New York, New York. The Clearing House is dedicated to protecting the rights and interests of its eleven members, eight of which are federally chartered national banks, as well as advancing the broader interests of the domestic commercial banking industry. At least three of the national bank members of the Clearing House, HSBC Bank USA, National Association ("HSBC Bank"), JPMorgan Chase Bank, National Association ("JPMorgan Chase Bank"), and Wells Fargo Bank, N.A. ("Wells Fargo Bank"), are subject to the Defendant's inquiry and requests for lending

information. Accordingly, the Clearing House has associational standing to bring this action on behalf of its members.

6. Defendant Eliot Spitzer is sued in his official capacity as Attorney General for the state of New York. He maintains executive offices at The Capitol, Albany, New York and at 120 Broadway, New York, New York, the office that has been principally involved in the events or occurrences forming the subject matter of this action.

DEFENDANT'S VIOLATIONS OF THE NATIONAL BANK ACT

The National Banks

7. HSBC Bank, JPMorgan Chase Bank, and Wells Fargo Bank (collectively, "the Clearing House Members") are each chartered pursuant to the National Bank Act, 12 U.S.C. § 21 *et seq.* Pursuant to regulations promulgated by the OCC, 12 C.F.R. §§ 5.34, 34.1, 7.4006, they carry on parts of their banking businesses through separately incorporated operating subsidiaries, which are treated for regulatory purposes as divisions of the national banks.

8. Either directly or through their operating subsidiaries, the Clearing House Members each engage in residential mortgage lending. Their mortgage lending programs are designed to promote home ownership and, consistent with the Community Reinvestment Act, include mortgage lending to less creditworthy

borrowers. As a matter of prudent and sound lending practice, loans to borrowers with different risk factors bear different interest rates.

9. Beginning in 2004, pursuant to Regulation C promulgated under the Federal Home Mortgage Disclosure Act ("HMDA"), large mortgage lenders have been required to report certain lending data to the OCC, the Board of Governors of the Federal Reserve System, and other federal banking agencies. For first- and second-lien loans, lenders are required to report particular information relating to loans that are 3 percentage points and 5 percentage points above the Treasury securities of comparable maturity, respectively. Lenders are required to disclose, among other things, the loan applicant's or borrower's race, ethnicity, sex, and income.

The New York Attorney General's Inquiry

10. By letter from Mr. Dennis Parker, the Bureau Chief of the Civil Rights Bureau of the New York Attorney General, dated April 19, 2005, the Defendant informed Wells Fargo & Co., the ultimate parent company of Wells Fargo Bank ("Wells Fargo") that, based on 2004 HMDA data, the Defendant had commenced a preliminary inquiry into the lending practices of Wells Fargo regarding potential violations of federal and state anti-discrimination laws. The Defendant requested that, in lieu of a formal subpoena, Wells Fargo "voluntarily" provide the Defendant with further information regarding its loans and lending practices.

11. The Defendant's request sought two categories of information. First, Defendant asked that Wells Fargo produce all data contained in Wells Fargo's HMDA Loan Application Register ("LAR") for loans and applications during 2004 related to property located in New York. Second, Defendant requested a variety of non-public material and information concerning Wells Fargo's residential real estate lending operations (the "lending information") including (1) a list and explanation of all variables that determined Annual Percentage Rates ("APRs") on 2004 HMDA-reportable loans, and related "formulas or algorithms," (2) extracts of every computer database that reflects loan conditions, pricing and "other variables" for 2004 HMDA-reportable loans, (3) all documents reflecting analysis or examination of racial or ethnic disparities in the 2004 HMDA data, (4) a list and explanation of all HMDA-reportable loan products, and (5) all policies and procedures concerning discretionary and/or exception pricing on HMDA-reportable loans.

12. By letter from Mr. Parker dated April 19, 2005, the Defendant informed HSBC Bank that he had commenced a similar inquiry concerning HSBC Bank and made substantially the same requests to HSBC Bank.

13. By letter from Mr. Parker dated April 20, 2005 to JP Morgan Chase & Co., the parent company of JPMorgan Chase Bank, Defendant stated that he had commenced a similar inquiry concerning JPMorgan Chase Bank and made substantially the same requests to JPMorgan Chase Bank.

14. Federal law obligates banks to make HMDA LAR data available to the public upon request. 12 C.F.R. § 203.5(c). Accordingly, the Clearing House Members have produced the first category of information to Defendant.

15. The second category of information sought by the Defendant is, however, nonpublic lending information that the Clearing House Members are not required to disclose to state officials. Accordingly, the Clearing House Members have not produced this information to Defendant.

16. On May 19, 2005, Wells Fargo Bank was told by Mr. Parker that Defendant was "probably" going to subpoena the lending information from Wells Fargo Bank since Wells Fargo Bank had not voluntarily provided the lending information. At that time, Mr. Parker told Wells Fargo Bank that the Defendant was in ongoing discussions with the OCC regarding jurisdictional issues with respect to the Defendant's inquiries into potential discriminatory lending.

17. On June 6, 2005, Mr. Parker told Wells Fargo Bank that the Defendant and the OCC had not been able to reach agreement on the exercise of jurisdiction, and once again asked Wells Fargo Bank to produce the lending information. Mr. Parker told Wells Fargo Bank that if it did not produce the lending information to the Defendant, the Defendant would either subpoena the lending information or file an action in New York State Court against Wells Fargo Bank regarding Wells Fargo

Bank's lending practices. Mr. Parker said that the Defendant was committed to continuing its inquiry and that it would be proceeding to issue a subpoena or file an action "within the next few days" unless Wells Fargo Bank produced the lending information.

18. Mr. Parker also told Wells Fargo Bank that the documents and lending information requested in the Defendant's April 19 letter represented only the first stage of the Defendant's inquiry and that the Defendant anticipated requesting substantial additional documents and information as its inquiry continued.

19. On information and belief, the Defendant's stated intention to subpoena the requested information or file a state court action in the immediate future if the information is not produced applies equally to HSBC Bank and JPMorgan Chase Bank.

20. The Defendant has publicly declared that he intends to proceed with his investigation into the lending practices of national banks despite being told by the OCC that he is impinging on the OCC's exclusive supervisory jurisdiction over national banks.

21. Under the National Bank Act and other federal banking laws, the OCC has licensing, regulatory, supervisory, examination, and enforcement authority with respect to national banks' compliance with both federal and state laws. *See* 12 U.S.C. §§ 24(Seventh), 93(a), 481, 1818(b); *see also* 12 C.F.R. § 7.4000.

22. In furtherance of the exclusivity of this authority, a provision of the National Bank Act, now codified as 12 U.S.C § 484(a), provides:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

This provision is a cornerstone of Congress' stated intent, as demonstrated by the legislative history of the National Bank Act, to ensure that national banks were not subject to supervision by state authorities.

23. 12 U.S.C. § 484(b) was added in 1982 to provide a limited exemption to this exclusive federal regulatory, supervisory, and examination jurisdiction of national banks, but it applies only "to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

24. The OCC's regulations interpreting section 484 provide:

> Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided [in the OCC's regulation interpreting

> 12 U.S.C § 484(b)]. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law."

12 C.F.R. § 7.4000(a)(l). The OCC's regulation defines "visitorial powers" to include "Examination of a bank"; "Inspection of a bank's books and records"; "Regulation and supervision of activities authorized or permitted pursuant to federal banking law"; and "Enforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. § 7.4000(a)(2).

25. The protections afforded to national banks from state licensing, regulation, supervision, examination, and enforcement apply equally to the operating subsidiaries of national banks. *See* 12 C.F.R. § 7.4006; *see also* 12 C.F.R. §§ 5.34 and 34.1.

26. The national bank members of the Clearing House and their operating subsidiaries commit considerable resources to ensuring their compliance with myriad applicable federal and state laws and regulations, including discrimination-in-lending laws and the Community Reinvestment Act. They undergo continuous regulation, supervision, examination, and monitoring by the OCC, and are subject to the OCC's enforcement jurisdiction with respect to both federal

and state law. They are also subject to special targeted examinations relating to laws governing consumer protection, including discrimination-in-lending laws and the Community Reinvestment Act. By seeking to inspect the books and records of the Clearing House Members and to otherwise exercise visitorial powers over them, the Defendant threatens to increase—and if not enjoined will increase—the compliance burden faced by the Clearing House Members in a manner expressly prohibited by federal law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, The Clearing House Association L.L.C., demands judgment against Defendant Eliot Spitzer, in his official capacity as Attorney General of the State of New York:

A. Preliminarily and permanently enjoining the Defendant, his agents, and all persons acting in concert with them from (1) investigating, requesting or issuing subpoenas for information concerning, or taking any other action to enforce federal and state discrimination-in-lending laws against, the national banks that are members of the Clearing House, or their operating subsidiaries, with respect to their mortgage lending operations, or (2) otherwise exercising visitorial powers with respect to those banks and operating subsidiaries in violation of Section 484 of the National Bank Act;

B. Granting plaintiff such other and further relief, including costs, as this Court may deem just and proper.

Dated: New York, New York
June 16, 2005

SULLIVAN & CROMWELL LLP

By: /s/ H. Rodgin Cohen
H. Rodgin Cohen (HC7168)
Gandolfo V. DiBlasi (GD5913)
Michael M. Wiseman (MW3209)
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. _____( )

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

v.

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF DAVID L. MOSKOWITZ

DAVID L. MOSKOWITZ declares:

1. I am Executive Vice President and General Counsel of Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. ("Wells Fargo Bank"). Wells Fargo Bank is a member of The Clearing House Association, L.L.C. ("The Clearing House"). I make this declaration on personal knowledge, except as expressly stated below, in support of The Clearing House's Motion for Preliminary Injunction and Temporary Restraining Order.

2. Wells Fargo Bank is a federally chartered national bank organized and existing under the National Bank Act. Wells Fargo Bank and its operating subsidiaries provide a wide variety of banking services to retail and commercial clients.

3. The business of Wells Fargo Bank and, to a limited extent, its operating subsidiaries includes residential mortgage lending throughout the United States, including New York. Wells Fargo Bank's mortgage lending program is designed to promote home ownership and, consistent with the Community Reinvestment Act, includes mortgage lending to less creditworthy borrowers. As a matter of prudent and sound lending practice, loans to borrowers with different risk factors bear different interest rates.

4. Pursuant to the National Bank Act, the mortgage lending business of Wells Fargo Bank and its operating subsidiaries is regulated by the Office of the Comptroller of the Currency ("OCC"). Wells Fargo Bank and its operating subsidiaries are subject to extensive ongoing regulation, supervision, examination, and enforcement by the OCC with respect to compliance with both federal and state laws.

5. Section 484 of the National Bank Act provides that national banks are not subject to visitorial powers except as authorized by federal law. Reflecting this clear congressional intent, the interpretive regulations promulgated by the OCC provide:

> State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law.

12 C.F.R. § 7.4000.

6. By letter dated April 19, 2005, a true and correct copy of which is attached as Exhibit A, the Office of the Attorney General for the State of New York ("Defendant") informed Wells Fargo & Co., the ultimate parent company of Wells Fargo Bank ("Wells Fargo") that, based on certain loan data reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), Defendant had commenced a preliminary inquiry into the lending practices of Wells Fargo regarding potential violations of federal and state anti-discrimination laws. Defendant requested that, in lieu of a formal subpoena, Wells Fargo "voluntarily" provide Defendant with information regarding its loans and lending practices.

7. Defendant's request sought two categories of information. First, Defendant asked that Wells Fargo produce all data contained in Wells Fargo's HMDA Loan Application Register ("LAR") for loans and applications during 2004 related to property located in the State of New York for calendar year 2004. Second, Defendant requested a variety of non-public material and information concerning Wells Fargo's residential real estate lending operations (the "lending information") including (1) a list and explanation of all variables that determined Annual Percentage Rates ("APRs") on 2004 HMDA-reportable loans, and related "formulas or algorithms," (2) extracts of every computer database that reflects loan conditions, pricing and "other variables" for 2004 HMDA-reportable loans, (3) all documents reflecting analysis or examination of racial or ethnic disparities in the 2004 HMDA data, (4) a list and explanation of all HMDA-reportable loan products, and (5) all policies and procedures concerning discretionary and/or exception pricing on HMDA-reportable loans.

8. Under Regulation C of HMDA (12 C.F.R. § 203.5(c)), Wells Fargo is obligated to make modified HMDA LAR data available to the public upon request, and Wells Fargo responded to the first category of document requests by providing the modified LAR to Defendant on May 2, 2005.

9. With respect to the second category, on May 16, 2005 Wells Fargo produced the lending information requested by Defendant for its non-bank subsidiaries and informed Defendant that it would provide lending information with respect to Wells Fargo's national bank subsidiaries directly to the OCC, their regulator.

10. On May 19, 2005, I wrote to the OCC on behalf of Wells Fargo Bank and, as required by OCC Advisory Letter 2002-9, described in detail the specific categories of information sought by Defendant. I stated that Wells Fargo Bank was prepared to respond to any additional OCC requests for information in connection with the OCC's ongoing review and analysis of Wells Fargo Bank's HMDA data.

11. On information and belief, the OCC and its sister federal agencies are closely reviewing and analyzing the HMDA data as part of their ongoing review and examination of federally regulated financial institutions' compliance with federal and state laws, including anti-discrimination laws.

12. On May 19, 2005, I received a telephone call from Dennis Parker, the Bureau Chief of the Civil Rights Bureau of the New York Attorney General. Mr. Parker told me that Defendant was "probably" going to subpoena the

lending information from Wells Fargo Bank since Wells Fargo Bank had not voluntarily provided the lending information. At that time, Mr. Parker told me that Defendant was in ongoing discussions with the OCC regarding jurisdictional issues with respect to Defendant's inquiries into potential discriminatory lending.

13. On June 6, 2005, I had another telephone conversation with Mr. Parker. Mr. Parker told me that Defendant and the OCC had not been able to reach agreement on the exercise of jurisdiction, and once again asked Wells Fargo Bank to produce the lending information. Mr. Parker told me that if Wells Fargo Bank did not produce the lending information to Defendant, Defendant would either subpoena the lending information or file an action in New York State Court against Wells Fargo regarding Wells Fargo Bank's lending practices. Mr. Parker said that Defendant was committed to continuing its inquiry and that it would be proceeding to issue a subpoena or file an action "within the next few days" unless Wells Fargo Bank produced the lending information. Mr. Parker also told me that the documents and lending information requested in Defendant's April 19 letter represented only the first stage of Defendant's inquiry and that Defendant anticipated requesting substantial additional documents and information as its inquiry continued.

14. Wells Fargo Bank and its operating subsidiaries commit considerable resources to ensuring their compliance with myriad applicable federal and state laws and regulations, including fair and responsible lending laws and the Community Reinvestment Act. Wells Fargo Bank

undergoes continuous regulation, supervision, examination and monitoring by the OCC, and is subject to the OCC's enforcement jurisdiction with respect to both federal and state law. It is also subject to special targeted examinations relating to laws governing consumer protection, including anti-discrimination statutes. By seeking to inspect the books and records of Wells Fargo Bank and to otherwise exercise visitorial powers over Wells Fargo Bank, Defendant threatens to increase—and if not enjoined will increase—the compliance burden faced by Wells Fargo Bank in a manner expressly prohibited by federal law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 14, 2005.

/s/ David L. Moskowitz
David L. Moskowitz

EXHIBIT A

State of New York
Office of the Attorney General

Eliot Spitzer
Attorney General

Division of Public Advocacy
Civil Rights Bureau

April 19, 2005

BY OVERNIGHT MAIL

Richard M. Kovacevich
President and CEO
Wells Fargo & Company
P.O. Box 6995
Portland, OR 97228

James M. Strother
Executive Vice President and General Counsel
Wells Fargo & Company
633 Folson Street, 7th Floor
San Francisco, CA 94107-3600

Re: 2004 HMDA Data

Dear Mr. Kovacevich and Mr. Strother:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year 2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and

reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing Wells Fargo's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that Wells Fargo voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for calendar year 2004. Please provide data for Wells Fargo as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate business considerations, we ask that you provide the following material:

a) A list of explanation of all variables that determined the APRs for 2004 HMDA reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions (*e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to Wells Fargo's 2004 HMDA reportable loans and applications conducted either by or on behalf of Wells Fargo.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by

application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,

/s/ Dennis D. Parker
Dennis D. Parker
Bureau Chief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. _____ ( )

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

v.

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF
JANET L. BURAK

JANET L. BURAK declares:

1. I am the Senior Executive Vice President, General Counsel, and Corporate Secretary of HSBC Bank U.S.A., N.A. ("HSBC Bank"). HSBC Bank is a member of The Clearing House Association, L.L.C. (the "Clearing House"). I make this declaration on personal knowledge and on knowledge I obtained in my capacity as General Counsel and Corporate Secretary for HSBC

Bank, except as expressly set forth below, in support of the Clearing House's Motion for a Preliminary Injunction and Temporary Restraining Order.

2. HSBC Bank is a federally chartered national bank organized and existing under the National Bank Act. It has its main office in Delaware with a management presence in New York, New York. HSBC Bank and its operating subsidiary, HSBC Mortgage Corporation USA ("HSBC Mortgage"), provide a wide variety of banking services to retail and commercial clients. The business of HSBC Bank and HSBC Mortgage includes residential mortgage lending throughout the United States, including in New York.

3. Pursuant to the National Bank Act, the residential lending business of HSBC Bank and HSBC Mortgage is regulated by the Office of the Comptroller of the Currency ("OCC"). HSBC Bank and HSBC Mortgage are subject to extensive ongoing regulation, supervision, examination, and enforcement by the OCC with respect to compliance with both federal and state laws. Other affiliated companies owned by HSBC Bank's holding company — which are neither national banks nor operating subsidiaries of national banks — are subject to regulation or examination by state regulators.

4. By letter dated April 19, 2005, a true copy of which is attached as Exhibit A, Defendant the Attorney General for the State of New York ("NYAG") informed HSBC Bank that, based on certain loan data reported pursuant to the Home Mortgage Disclosure Act

("HMDA"), the Defendant has commenced a preliminary inquiry into certain lending practices. The Defendant asked that HSBC Bank cooperate "voluntarily" with the inquiry by providing information regarding its loans and lending practices, but expressly indicated that the requests for information were "[i]n lieu of issuing a formal subpoena." On information and belief, several other national banks that are members of the Clearing House received similar requests from the Defendant on or around April 19, 2005.

5. The Defendant's request sought two categories of documents. First, the NYAG asked that HSBC Bank and all of its subsidiaries and units produce all data contained in their HMDA Loan Application Register ("LAR") for loans and applications related to property located in the State of New York for Calendar Year 2004. Second, the Defendant requested a variety of non-public material concerning HSBC's residential real estate lending operations (the "lending information"), including (1) a list and explanation of all variables that determined Annual Percentage Rates ("APRs") on 2004 HMDA-reportable loans, and related "formulas or algorithms"; (2) extracts of every computer database that reflects loan conditions, pricing and "other variables" for 2004 HMDA-reportable loans; (3) all documents reflecting analysis or examination of racial or ethnic disparities in the 2004 HMDA data; (4) a list and explanation of all HMDA-reportable loan products; and (5) all policies and procedures concerning discretionary and/or exception pricing on HMDA-reportable loans.

6. Under Regulation C of HMDA (12 C.F.R. § 203.5(c)), HSBC Bank is obligated to make modified HMDA LAR data available to the public upon request. Accordingly, HSBC Bank produced the first category of document requests by providing the modified LAR to the NYAG for HSBC Bank and all related entities. HSBC Bank also transmitted considerable lending information on behalf of affiliates other than itself and HSBC Mortgage on June 14, 2005.

7. The actions of the Attorney General's Office, particularly its request for detailed lending information from HSBC Bank and HSBC Mortgage, are generally of a type that HSBC Bank and HSBC Mortgage would expect in connection with an OCC visitorial examination. HSBC Bank and HSBC Mortgage are addressing their HMDA data, and other relevant information, with the OCC in keeping with its supervisory processes.

8. Most of the information requested by the Attorney General's Office is highly confidential, either because it involves trade secrets or proprietary information that could cause HSBC Bank and HSBC Mortgage significant commercial harm if released, or because it involves detailed personal information about HSBC customers that could cause serious personal privacy violations if released.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2005.

/s/ Janet L. Burak
Janet L. Burak

EXHIBIT A

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC
ADVOCACY
Civil Rights Bureau

April 19, 2005

BY OVERNIGHT MAIL

Martin J.G. Glynn
President and CEO
HSBC Bank USA, N.A.
452 Fifth Avenue,10th Floor
New York, NY 10018

Janet L. Burak
General Counsel
HSBC Bank USA, N.A.
452 Fifth Avenue, 7th Floor
New York, NY 10018

Re: 2004 HMDA Data

Dear Mr. Glynn and Ms. Burak:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year

2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing HSBC's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that HSBC voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for calendar year 2004. Please provide data for HSBC as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate business considerations, we ask that you provide the following material:

a) A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions (*e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to HSBC's 2004 HMDA reportable loans and applications conducted either by or on behalf of HSBC.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered

to a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,

/s/ Dennis D. Parker
Dennis D. Parker
Bureau Chief

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. _____ ( )

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

v.

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF
ADAM R. BREBNER

ADAM R. BREBNER declares:

1. I am a member of the bar of this Court associated with Sullivan & Cromwell LLP, attorneys for plaintiff The Clearing House Association, L.L.C. (the "Clearing House"). I make this declaration in support of the Clearing House's application for an order to show cause, temporary restraining order, and preliminary injunction.

2. Plaintiff seeks a temporary restraining order and preliminary injunction preventing Defendant from

continuing an inquiry into, or commencing enforcement proceedings concerning, the lending practices of members of the Clearing House that are federally chartered national banks. As explained in the Memorandum of Law submitted herewith, the National Bank Act provides, "No national bank shall be subject to any visitorial powers except as authorized by Federal law. . . ." 12 U.S.C § 484(a). The Office of the Comptroller of the Currency (the "OCC") has issued regulations interpreting this statute to mean that "State officials may not . . . conduct[] examinations, inspect[] or require[] the production of books or records of national banks, or prosecut[e] enforcement actions [against national banks], except in limited circumstances authorized by federal law." 12 C.F.R. § 7.4000(a)(1). Despite this clear federal law, the Defendant has commenced inquiries into the lending activities of several national banks and threatened to subpoena or bring enforcement proceedings against these banks. In this action, the Clearing House seeks injunctive relief on behalf of its members that are federally chartered national banks, and their operating subsidiaries, against the Defendant's actions in violation of the National Bank Act and the regulations promulgated by the OCC.

3. The Clearing House members and their operating subsidiaries will be irreparably injured in the absence of a temporary restraining order and preliminary injunction because their right to be free from the exercise of visitorial powers by state regulators will be

destroyed by the very process of investigation and (potentially) litigation, no matter what the ultimate outcome on the merits. *See, e.g., First Union Nat'l Bank v. Burke,* 48 F. Supp. 2d 132, 149-50 (D. Conn. 1999) (finding irreparable injury sufficient to warrant the granting a preliminary injunction in a visitorial powers case because "the Commissioner's enforcement actions continue to displace the OCC's supervisory authority in a way that cannot be undone, since the exercise of such administrative authority by the Commissioner is mutually inconsistent with the OCC's exclusive authority"); *see also Nat'l City Bank of Indiana v. Boutris*, 2003 WL 21536818, at *7 (ED. Cal. July 2, 2003) (State Commissioner's exercise of visitorial powers and enforcement of preempted state statute would cause irreparable harm); *Wells Fargo Bank, NA. v. Boutris,* 252 F. Supp. 2d 1065, 1073 (E.D. Cal. 2003) (State Commissioner preliminarily enjoined from exercising visitorial powers when bank's lending business would be disrupted and bank would face significant compliance costs).

4. As shown in the letters annexed to the Declaration of David L. Moskowitz, dated June 15, 2005, and the Declaration of Janet L. Burak, dated June 15, 2005, Dennis Parker, Bureau Chief, Civil Rights Bureau, Office of the Attorney General, is the attorney at the office of the Attorney General who has been directly in contact with the members of the Clearing House with respect to these matters and signed the letters that certain members of the Clearing House have received with respect to these matters. Accordingly, in the

proposed order to show cause, we have suggested that the order to show cause, the summons, the complaint, and the papers in support of Plaintiff's application be served on Mr. Parker at his office at 120 Broadway, New York, NY 10271, as well as on the Defendant at his executive office at The Capitol, Albany, NY 12224-0341.

5. There has been no prior application for the same or any similar relief.

6. Attached hereto as Exhibit A is a true and correct copy of Hannah Bergman, *Spitzer: OCC is Blocking N.Y.'s Probe of Lenders*, AM. BANKER, May 19, 2005, No. 96, Vol. 170, at 1.

7. Attached hereto as Exhibit B is OCC Interpretive Letter 971 (Jan. 16, 2003), *available at* http://www.occ.treas.gov/interp/sep03/int971.doc.

8. Attached hereto as Exhibit C is OCC Advisory Letter 2002-9 (Nov. 25, 2002), *available at* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.

9. Attached hereto as Exhibit D is a true and correct copy of Remarks by [Federal Reserve] Governor Edward M. Gramlich To the National Association of Real Estate Editors, Washington, D.C. (June 3, 2005), *available at* http //www.federalreserve.gov/boarddocs/speeches/2005/20050603/default.htm.

10. Attached hereto as Exhibit E is a true and correct copy of OCC News Release 2005-52, Acting

Comptroller of the Currency Julie L. Williams Issues Statement Responding to New York Attorney General (May 19, 2005), *available at* http://www.occ.treas.gov/05rellst.htm.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 2005.

/s/ Adam R. Brebner
Adam R. Brebner

EXHIBIT A

www.americanbanker.com

Spitzer: OCC Is Blocking N.Y.'s Probe Of Lenders

BY BARBARA DENHAM

WASHINGTON — The Office of the Comptroller of the Currency may have finally weighed in on New York Attorney General Eliot Spitzer's investigation of mortgage lending practices.

The OCC has not taken any formal actions, but Mr. Spitzer said in a speech here Wednesday that officials at the national bank regulator called his office two days earlier to say his investigation was coming in on their jurisdiction.

Such a discussion would have broken the OCC's extended silence on whether it would assert its preemption power.

"Our investigation of whether or not banks are properly lending to minorities and women, they're trying to intercede on behalf of the banks, keeping us from getting the data we need," Mr. Spitzer said during his speech at the Center for American Progress. "As recently as two days ago I got a phone call from the very top of the OCC saying, 'We think you're preempting.' Well, I don't think we are, and we're going to find out in court someday."

American Banker reported Monday that many banking industry officials were anxious about the fact that the OCC had not said whether, or to what extent, national banks should cooperate with Mr. Spitzer's investigation.

Fair-lending complaints have gained momentum since more detailed data became available this spring under enhanced Home Mortgage Disclosure Act rules, and Mr. Spitzer's office has asked several banks for publicly reported data and other information.

See page 2

Federal Agencies 'Beaten Down and Neutered': Spitzer

Continued from page 1

"We're talking a whole bunch of different entities, who have different regulatory status, but there are certainly many that we've looked that we believe to be likely within our regulatory purview," Mr. Spitzer told reporters.

The OCC did not respond directly to Mr. Spitzer's comments, but a spokesman said that after the Federal Reserve Board completes its HMDA data checks, "we fully expect to look carefully at the data for the institutions we supervise to see if there are any trends or actions we need to take."

In his speech, Mr. Spitzer faulted the OCC, and executive branch agencies in general, for not protecting consumers against predatory lending practices and for expediting easy approvals for banks.

"They are not out there ensuring there's fairness, equity, integrity in the marketplace. They're preempting us so that we can't do what is reasonable," he said.

The preemption fight may go beyond the OCC.

On Monday, Mr. Spitzer and the attorneys general of six other states sent a letter to the Federal Deposit Insurance Corp., which is scheduled to hold a hearing next week on whether preemption could be established for state-chartered banks that operate in other states.

"Not only does the FDIC lack authority to adopt the rules requested ... [but] any such rules would undermine the states' sovereign authority to police their borders and protect their citizens," Mr. Spitzer wrote.

Whether or not he has jurisdiction, some national banks appear to be complying with his mortgage investigation.

At least one national bank has responded to the information requests, a spokeswoman in Mr. Spitzer's office said Wednesday, and the office anticipates others will also respond soon.

Mr. Spitzer said his office was asking lenders for "just enough data" to analyze. "This is an early, early stage inquiry."

This year, for the first time, the HMDA data includes the race, sex, and income range of borrowers receiving relatively high-rate loans. The data that banks have disclosed shows that minority borrowers have been far more likely than whites to receive such loans.

Spitzer: His office's mortgage probe is "an early, early stage inquiry."

Mr. Spitzer's speech focused on the appropriate role of government in the market and when intervention is necessary to give the market more information to function correctly.

Over the past 20 years "the federal agencies have essentially been so beaten down and neutered, they've been rendered incapable of fulfilling their fundamental mandate," he said.

"They have not only been rendered incapable, but they have been sapped of the desire."

As examples of this, he cited his investigations of investment banking firms and of First Horizon National Corp.'s response to a consumer complaint his office received in late 2003.

First Horizon left a voicemail that said, "'Go away. You're a state agency. You have been preempted by the OCC,' " Mr. Spitzer said.

"This is now the world we're living in, when we simply call up a federal agency to say help, or call a bank to say stop trying to foreclose on this guy's house. ... They invoke a federal agency as protection against us, because we've been preempted by a federal agency that doesn't want us to protect consumers," he said.

BEST AVAILABLE COPY

EXHIBIT B

Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

January 16, 2003

Interpretive Letter #971
September 2003
12 USC 24(7)

January 16, 2003

Reginald S. Evans, Esq.
Chief Counsel
Pennsylvania Department of Banking
333 Market Street, 16th Floor
Harrisburg, PA 17101-2290

Subject: [*Op. Sub*]

Dear Mr. Evans:

This letter responds to your letter dated September 17, 2002, in which you ask a number of questions concerning the manner in which the Office of the Comptroller of the Currency ("OCC") supervises operating subsidiaries of national banks. Many of these questions relate specifically to the OCC's supervision of [ ] ("[*Op. Sub*]"), an operating subsidiary of [*NB*], [*City, State*] ("the Bank"). [*Op. Sub*] is incorporated in [*State2*].

The tenor of your questions suggests that Pennsylvania has the authority to supervise the activities of [*Op. Sub*] and, by implication, other operating subsidiaries of national banks. However, federal law and OCC regulations vest the OCC with exclusive "visitorial" powers over national banks and their operating subsidiaries.[1] Those powers include examining national banks, inspecting their books and records, regulating and supervising their activities pursuant to federal banking law, and enforcing compliance with federal or any applicable state law concerning those activities.[2] Federal law thus limits the extent to which any other governmental entity may exercise visitorial powers over national banks and their operating subsidiaries. Our response to your letter is provided to further the state's understanding of the OCC's supervision of national bank subsidiaries, but does not alter the jurisdiction established by federal law.

The OCC has urged state officials to contact the OCC if they have any information regarding allegations of violation of particular state laws by national banks or their subsidiaries.[3] In addition, any consumer complaints concerning any part of the operations of any national bank or operating subsidiary, including the Bank and

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1. 12 U.S.C. § 484(a); 12 C.F.R. § 7.4006.

2. Advisory Letter No. 2002-9 (Nov. 25, 2002); 12 C.F.R. § 7.4000(a)(2).

3. Advisory Letter No. 2002-9 at 4.

[*Op. Sub*] are referred to the OCC Customer Assistance Group ("CAG"), which is located in Houston, Texas. The CAG investigates the complaint, with the assistance of other OCC units where appropriate,[4] and recommends appropriate action.

The Nature and Scope of OCC Examinations

Many of your questions relate to the OCC's examination policies and procedures. For example, you ask questions concerning the scope of OCC examinations and the laws with which national banks and their operating subsidiaries must comply. The OCC conducts comprehensive examinations of a national bank's business, including its compliance with principles of safe and sound banking and its compliance with applicable laws. In addition, the OCC conducts targeted examinations that may cover one or more elements of a comprehensive examination, such as compliance with specific laws. The OCC has issued substantial guidance, which should provide more detailed answers to your questions. Copies of those materials are enclosed.

National banks have express authority to create operating subsidiaries, which may engage in any activity permissible to the parent bank itself.[5] Generally, an operating subsidiary is a corporation or similar entity,

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4. For example, attorneys in the Law Department may provide legal advice if the matter involves questions of law.

5. *See* generally 12 C.F.R. § 5.34.

in which a national bank owns more than 50 percent of the voting interest, or otherwise maintains a controlling interest.[6] Because the activities of an operating subsidiary are limited to activities in which the parent bank could engage directly, an operating subsidiary is in practice a separately incorporated division or department of the parent bank. Thus, the OCC's standards in examining [*Op. Sub*] are the same standards that apply to OCC examinations of the Bank. Consistent with the guidance enclosed with this letter, the OCC's examination of [*Op. Sub*] addresses compliance with applicable laws, such as consumer protection laws, as well as compliance with standards of safe and sound banking.

[*Op. Sub*] engages in subprime mortgage lending. Because of the safety and soundness and compliance risks posed by these lending programs, the OCC has published additional guidance relating to subprime lending activities. The OCC relies on this guidance in examining [*Op. Sub*] and other subprime lenders and, therefore, applies the same standards to [*Op. Sub*] as it would to any national bank or operating subsidiary engaged in subprime lending activities. Copies of this guidance are enclosed for your reference.

In examining the lending function of a national bank or an operating subsidiary, the OCC typically reviews a sample of loans owned by the institution. This sample

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6. 12 C.F.R. § 5.34(e)(2).

generally will include larger loans and loans that the institution has previously identified as problem loans. Through this review, the OCC will determine the quality of the loans (*e.g.*, the likelihood of repayment), the adequacy and completeness of the information concerning the loan and the borrower, and whether the lending function is being carried out in compliance with applicable laws. The OCC evaluates the adequacy of all elements of the institution's business, including earnings, assets, management, liquidity, sensitivity to market risk, and information systems, as well as specialty areas such as any trust operations that may exist. The examination process is intended to provide a high level of assurance that each aspect of an institution's business is conducted on a safe and sound basis and in compliance with applicable laws.

[*Op. Sub*] generally does not retain the loans that it originates, but instead sells them in the secondary market shortly after origination. Based on those activities, the OCC reviews [*Op. Sub*]' lending function to determine compliance with all applicable laws and principles of safety and soundness.

Applicability of State Law

Some of your questions relate to the applicability of state (and federal) law to operating subsidiaries. For example, you ask whether state consumer protection laws apply to national bank operating subsidiaries. The OCC's regulations provide that state law applies to the

operating subsidiary of a national bank "to the same extent that those laws apply to the parent national bank."[7] Questions about the applicability of state laws to national banks may be addressed in a variety of ways. In some cases, our regulations contain express provisions that address the applicability of state law to a national bank.[8] From time to time, the OCC also provides legal opinions that respond to specific requests and express our views about the applicability of particular state laws to national banks.[9] Preemption issues also may be resolved through litigation over the applicability of particular state laws to national banks.[10]

For example, courts have repeatedly recognized the essentially federal character of national banks,[11] and the

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7. 12 C.F.R. § 7.4006.

8. *E.g.*, 12 C.F.R. §§ 7.5002(c) (furnishing products and services by electronic means), 34.4 (real estate lending), and 37.1(c) (debt cancellation contracts).

9. *E.g.*, 66 Fed. Reg. 28,593 (May 23, 2001) (Michigan statute concerning motor vehicle loans); 65 Fed. Reg. 15,037 (March 20, 2000) (Pennsylvania statute concerning auctions and auctioneers).

10. *The Bank of America v. City and County of San Francisco*, 309 F.3d 551 (9th Cir. 2002); *Bank One Utah, N.A. v. Guttau*, 109 F.3d 844 (8th Cir. 1999).

11. *See, e.g., Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("[n]ational banks are instrumentalities of the Federal government").

Supreme Court has held that subjecting national banks' federally authorized activities to state regulation and supervision would conflict with their federally derived powers and with the purposes for which the national banking system was established.[12] In one such decision, the Court noted that national banks are "instrumentalities" of the federal government and stated that "any attempt by a State to define [the] duties [of a national bank] or control the conduct of [the] affairs [of the national bank] is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of

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12. *See Easton v. Iowa*, 188 US. 220, 229, 231-32 (1903), in which the Supreme Court explained:

> [Federal legislation concerning national banks] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states. . . . [w]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

See also Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996) (the powers of national banks are "grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law").

the bank to discharge the duties for which it was created."[13]

Essential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards.[14] To that end, Congress vested in the OCC broad authority to regulate the conduct of national banks except where the authority to issue such regulations has been "expressly and exclusively" given to another federal regulatory agency. 12 USC 93a. State law could be applicable to national banks, however, in limited circumstances when it does not conflict or interfere with

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13. *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368, 369 (1923). *See also Bank of America*, 309 F.3d at 561 (state attempts "to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties").

14. Such standards may be embodied explicitly in OCC regulations, or in other federal law, including various federal consumer protection laws, such as the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act. *See* 15 USC 1601 *et seq.*; 12 USC 4301 *et seq.*; 15 USC 1693 *et seq.*; 12 USC 2601 at *seq.*; 15 USC 1691 *et seq.*; 15 USC 45. However, whether or not the OCC has specifically addressed a national bank activity in a regulation, all national bank operations must be conducted in a safe and sound manner, in accordance with the OCC's supervisory standards.

the national bank's exercise of its powers. Thus, for instance, one federal court recently noted that states retain some power to regulate national banks in areas such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[15]

You also ask whether a litigant in a lawsuit against [*Op. Sub*] could pierce the corporate veil to recover damages from the Bank. This question would be more appropriately discussed in the context of litigation between [*Op. Sub*] and a customer or other third party involving a specific factual situation. In general, though, mere ownership of a subsidiary corporation does not result in liability on the part of the parent for acts of its subsidiary.

OCC Supervision of [*Op. Sub*]

The OCC examines national banks and their operating subsidiaries on a regular basis. Federal law requires that the OCC examine national banks, such as the Bank, at least once every 12 months.[16] However, the OCC may examine an institution more frequently if warranted by

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15. *Bank of America*, 309 F.3d at 559.

16. 12 U.S.C. § 1820(d)(1). If a bank has less than $250,000,000 in assets and is in good condition, the OCC need only examine it at least once every 18 months. 12 U.S.C. § 1820(d)(4).

the institution's asset size, condition, or other factors. For example, the largest national banks have on-site examination teams conducting continuous examinations. Thus, while it is impossible to predict the exact timing of OCC examinations of [*Op. Sub*] in the future, it appears very likely that the OCC will continue to conduct an examination of [*Op. Sub*] at least every 12 months, consistent with the federal statutory schedule for examining the Bank.

The OCC generally prepares letters transmitting the examination findings to [*Op. Sub*] and the Bank. Those letters are the equivalent of examination reports and, therefore, are considered confidential. Examination reports, along with other bank examination information, are exempt from disclosure under the Freedom of Information Act.[17] This information is also subject to a limited privilege from discovery in third-party litigation.[18] These protections reflect the sensitive nature of bank examination information and support the longstanding policy of the OCC not to provide examination reports to third parties. Typically, the OCC

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17. 5 U.S.C. § 552(b)(8).

18. *In re Subpoena Duces Tecum Served Upon the Comptroller of the Currency and the Secretary of the Board of Governors of the Federal Reserve System*, 967 F.2d 630 (D.C. Cir. 1992).

will make confidential bank examination information available to state bank regulatory agencies if they demonstrate a specific regulatory need for the examination information (*e.g.*, merger of a national bank into a state bank, where the state bank regulator must approve the transaction), and if the state agency has entered into an appropriate information sharing/ confidentiality agreement with the OCC governing use of the information.

I hope the foregoing has been of assistance to you in understanding the nature of the OCC's supervision of [*Op. Sub*]. If you have any questions concerning this letter, please contact Frederick Petrick, Counsel, Litigation Division, at 202-874-5280, or Mary Ann Nash, Counsel, Legislative & Regulatory Activities Division, at 202-874-5090.

Sincerely,

/s/ Julie L. Williams

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

Enclosures

EXHIBIT C

AL 2002 - 9

OCC ADVISORY LETTER

Comptroller of the Currency
Administrator of National Banks

Subject: Questions Concerning Applicability and Enforcement of State Laws: Contacts From State Officials

TO: Chief Executive Officers of all National Banks, Department and Division Heads, and All Examining Personnel

PURPOSE

This advisory letter describes the general principles that apply in determining whether a state law is applicable to a national bank. It also describes the statutory authority of the OCC to regulate national banks, to examine national banks for compliance with federal and applicable state laws, and to enforce these laws. Finally, it advises national banks to consult with the OCC if state officials contact them concerning the potential application of a state law, or if these officials seek information concerning a national bank's operations.

BACKGROUND

Recently, we have been asked for guidance on the role of state officials in the enforcement of state laws that may affect national bank operations. The applicability of state laws to national banks and their operating subsidiaries – and the authority to enforce those laws – raise complex issues of both federal preemption and the statutory authority of the OCC as the supervisor and regulator of national banks.[1] Due to the often complex nature of the determinations regarding the application and enforcement of state law in a particular instance, this advisory letter notifies national banks to consult with the OCC on such matters. In addition, it encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws, or if they seek information from national banks. We appreciate the interest of state officials in these issues, and this advisory is designed to summarize the standards that are applicable in this area.

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1. In most instances, the OCC is responsible for enforcing federal laws that apply to national banks or to their operating subsidiaries. However, some federal statutes also specifically give enforcement authority to state attorneys general. See, *e.g.*, 15 USC 1681s(c) (Fair Credit Reporting Act). Even in these instances, issues may arise as to the appropriate role of a state official with respect to a national bank's activities. Thus, the procedures discussed is this advisory letter should also be followed by national banks in instances involving any state attorney general enforcement action under federal law.

Applicability of State Laws to National Banks

The National Bank Act was enacted in 1864 to create a new system of nationally chartered banks that would operate independently of state regulation.[2] Since that time, courts have recognized the essentially federal character of national banks,[3] and the Supreme Court has repeatedly held that subjecting national banks' federally authorized activities to state regulation and supervision would conflict with their federally derived powers and with the purposes for which the national banking system was established.[4] In one such decision,

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2. *Bank of Am. v. City and County of San Francisco*, 309 F.3d 551, 561 (9th Cir. 2002) (citing Cong. Globe, 38th Cong., 1st Sess., 1451 (1864)).

3. *See, e.g., Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896) ("[n]ational banks are instrumentalities of the Federal government").

4. *See Easton v. Iowa*, 188 U.S. 220, 229, 231-32 (1903), in which the Supreme Court explained:

> [Federal legislation concerning national banks] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and numerous as the states . . . [W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and

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the Court noted that national banks are "instrumentalities" of the federal government and stated that "any attempt by a State to define [the] duties [of a national bank] or control the conduct of [the] affairs [of the national bank] is void whenever it conflicts with the laws of the United States or frustrates the purposes of the national legislation or impairs the efficiency of the bank to discharge the duties for which it was created."[5]

Essential to the character of national banks and the national banking system is the uniform and consistent regulation of national banks by *federal* standards.[6]

(Cont'd)

> stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

See also Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 32 (1996) (the powers of national banks are "grants of authority not normally limited by, but rather ordinarily pre-empting contrary state law").

5. *First Nat'l Bank of San Jose v. California*, 262 US. 366, 368, 369 (1923). *See also Bank of Am.*, 309 F.3d at 561 (state attempts "to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties").

6. Such standards may be embodied explicitly in OCC regulations, or in other federal law, including various federal (Cont'd)

To that end, Congress vested in the OCC broad authority to regulate the conduct of national banks except where the authority to issue such regulations has been "expressly and exclusively" given to another federal regulatory agency. 12 USC 93a. State law could be applicable to national banks, however, in limited circumstances when it does not conflict or interfere with the national bank's exercise of its powers. Thus, for instance, one federal court recently noted that states retain some power to regulate national banks in areas such as "contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[7]

Supervision of National Banks and Enforcement of Applicable Laws

In addition to uniform federal standards for regulation of national banks, Congress provided for a

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consumer protection laws, such as the Truth in Lending Act, the Truth in Savings Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, the Equal Credit Opportunity Act, and the Federal Trade Commission Act. *See* 15 USC 1601 *et seq.*; 12 USC 4301 *et seq.*; 15 USC 1693 *et seq.*; 12 USC 2601 *et seq.*; 15 USC 1691 *et seq.*; 15 USC 45. However, whether or not the OCC has specifically addressed a national bank activity in a regulation, all national bank operations must be conducted in a safe and sound manner, in accordance with the OCC's supervisory standards.

7. *Bank of Am.*, 309 F.3d at 559.

complementary system of uniform federal oversight of the activities of national banks as an integral component of the national banking system. Exclusive federal oversight, uniform federal regulation, and state law preemption constitute three essential and distinctive elements of the national bank charter.[8]

Congress provided that the uniform federal standards that would govern national banks – and state laws, where federal law makes them applicable – would be enforced by a single, federal supervisor, the OCC. By statute, national banks generally are not subject to any visitorial powers except as authorized by federal law:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House

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8. Moreover, OCC regulations provide for comparable treatment of national bank operating subsidiaries. The OCC's regulations state: "Unless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 CFR 7.4006. In addition, 12 CFR 534(e)(3) provides that "[a]n operating subsidiary conducts activities authorized under this section pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."

> thereof or by any committee of Congress or of either House duly authorized.[9]

12 USC 484(a). The OCC is specifically authorized under the National Bank Act to "examine every national bank as often as the Comptroller of the Currency shall deem necessary," and OCC examiners have the power to "make a thorough examination of all the affairs of the bank." 12 USC 481. Thus, except in specialized instances where federal law makes provision for another regulator to have a role, the OCC's visitorial powers are exclusive with respect to activities that are authorized or permitted for national banks under federal law or regulation, or by OCC issuance or interpretation.

Congress reaffirmed the OCC's exclusive visitorial powers in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. Pub. L. 103-328, 108 Stat. 2338 (1994). Congress provided in that legislation that specified types of laws of the "host" state in which a national bank has an interstate branch are applicable, *unless* federal law preempts their application to national banks. However, Congress stated that "[t]he provisions

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9. "Visitorial" powers generally refer to the power to "visit" a national bank to examine the conduct of its business and to enforce its observance of applicable laws. *See, e.g., Guthrie v. Harkness,* 199 U.S.148, 158 (1905) (the word "visitation" means "inspection; superintendence; direction; regulation") (internal quotations omitted). Section 484 provides an exception to the OCC's exclusive visitorial authority for state examiners inspecting for compliance with state unclaimed property or escheat laws upon reasonable cause to believe the bank has failed to comply with those laws. 12 USC 484(b).

of any State law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 USC 36(f)(1)(B).[10]

The OCC's regulations also set forth the agency's exclusive visitorial authority, providing that, subject to limited exceptions, only the OCC may exercise visitorial powers with respect to national banks. 12 CFR 7.4000(a)(1). These exclusive visitorial powers include:

1. examination of a bank,

2. inspection of a bank's books and records,

3. regulation and supervision of activities authorized or permitted pursuant to federal banking law, and

4. enforcing compliance with any applicable federal or state laws concerning those activities.

12 CFR 7.4000(a)(2)(i - iv).

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10. *See also National State Bank v. Long*, 630 F.2d 981, 989 (3rd Cir. 1980) ("[E]nforcement of the state statute is the responsibility of the Comptroller of the Currency rather than the State Commissioner.")

PROCEDURE

The OCC recognizes that state officials may from time to time possess information that would be valuable to the OCC in connection with its oversight of national banks, or may seek to obtain information from national banks concerning their operations. Given the complexity of issues that can arise with respect to whether a state law is applicable to national bank operations, the enforcement of any such laws, or the propriety of disclosure of information concerning a national bank's operations, the OCC has established the following procedure to address circumstances when state officials raise issues concerning potential violations of laws by national banks, including when state officials may seek information from a national bank about its compliance with any law or for other purposes:

- **State officials are urged to contact the OCC** if they have any information to indicate that a national bank may be violating federal or an applicable state law or if they seek information concerning a national bank's operations. The OCC will review any such information and, if appropriate, take supervisory action, which may include an enforcement action, if it concludes that a national bank has violated an applicable law.

- **National banks should contact the OCC** if they are contacted by a state official seeking information from the bank that may constitute an attempt to exercise visitation or enforcement power over the bank. National banks are

encouraged to consult with the OCC as soon as possible following the initial contact by a state official on whether such request may conflict with the federal standards applicable to the regulation and supervision of national banks. Following such consultation, the OCC may want to contact the state official directly to discuss the state's inquiry and to obtain any information that the state might possess that may be relevant to the OCC's supervision of the bank.

OCC Contacts:

- Director, Enforcement and Compliance Division, at (202) 874-4800 (for inquiries by state officials and questions about this Advisory Letter)
- Director, Community and Consumer Law Division, at (202) 874-5750 (for inquiries by state officials and questions about this Advisory Letter)
- The OCC District Counsel for the district in which the bank is headquartered (for inquiries by state officials)
- Director, Legislative and Regulatory Activities Division, at (202) 874-5090 (for questions about preemption and visitorial powers generally)

Julie L. Williams
First Senior Deputy Comptroller and Chief Counsel

EXHIBIT D

The Federal Reserve Board

Remarks by Governor Edward M. Gramlich
To the National Association of Real Estate Editors,
Washington, D.C.
June 3, 2005

HMDA Data and Their Effect on Mortgage Markets

Thank you for the invitation to speak today. I am particularly pleased to accept an invitation to address the National Association of Real Estate Editors. Journalists are critical in helping the public understand the economics of the mortgage market, which has become more accessible, yet also more complex than ever. Your ability to demystify the mortgage market and identify trends greatly improves the public's understanding of the housing market–the market for one of the most important financial transactions an individual will ever undertake.

I also note that your readership includes real estate professionals–another group of individuals who play a crucial role in the efficient operation of the housing market. Homeowners often rely on recommendations from their realtors when looking for financing. Realtors must understand the role they play in making credit markets work, and in promoting sustainable homeownership opportunities for individuals.

In our society, homeownership is the most common step one can take toward accumulating wealth. Home equity, built over time, has also become an important source of cash for other investments, including educational expenses. Moreover, homeownership strengthens communities by turning residents into investors with an ownership interest in the places they live. Recently, homeownership rates have reached record levels, thanks, in large measure, to technological innovations that allow for risk-based pricing of loans, along with the rapid growth of the subprime mortgage market.

This brings me to the topic I want to discuss today: the recent release of pricing information collected under the Home Mortgage Disclosure Act (HMDA). As you are aware, HMDA requires that large mortgage lenders report their lending activities to the Federal Reserve Board and its sister agencies. The Board validates and ultimately compiles the data into a format that is made available to the public. The public can then use this information to evaluate whether lenders are serving their communities, enforcing laws prohibiting discrimination in lending, and providing private investors with information to guide investments in housing. Generally, for-profit lenders that have offices in metropolitan areas and that have more than $34 million in assets, or whose mortgage lending represents 10 percent of their lending originations, must report under HMDA.

In my remarks today, I will first review the history of HMDA as a backdrop for the new HMDA pricing data.

The Federal Reserve is still editing these data, but I will also provide a preview of what they are likely to show.

HMDA History in Brief

The regulations implementing HMDA require that lenders disclose aspects of their home mortgage application and lending activities, including the applicant's or borrower's race, ethnicity, sex, and income. Also reported are characteristics of the loan, such as the amount and purpose, and the location of the property securing the loan. But it was not always this way.

When HMDA was originally enacted in the mid-1970s, the only information required to be reported was the number and dollar amount of loans, by census tract. Congress, concerned about the role that financial institutions' lending policies might play in the deterioration of our cities, designed HMDA to combat the practice known as "redlining," in which institutions took deposits but did not lend in their local communities. Initially, HMDA data simply helped the public and regulators track where an institution was lending and, more important, where it was not.

Not until the late 1980s did the data collection expand to include race, sex, and income levels for each loan application, along with whether the application was approved or denied. By then, the issue was whether minority borrowers were denied mortgage loans more

frequently than white borrowers and whether those disparities reflected discrimination in mortgage underwriting.

Today, after significant changes in the mortgage market brought on by technological advances, deregulation, and financial innovation, the credit availability question is no longer limited to whether minority borrowers have access to credit but, rather, at what price that credit is available. Moreover, there are new questions about whether the price of credit always reflects the lender's risk or cost, or whether it is tied in any way to the race or sex of the borrower.

The technological changes have led to strong growth in the subprime mortgage market. In general, this growth appears to be a positive development. Homeownership is at record highs among low-income and minority borrowers, many of whom would not have qualified for mortgages several years ago, and most of whom have been able to make their mortgage payments. At the same time, the increase in mortgage lending among lower-income and minority borrowers has been accompanied by reports of abusive, unethical, and, in some cases, illegal lending practices. I am sure you are aware of the concern about whether consumers have the ability to shop for mortgages and to avoid unfair or deceptive lending arrangements.

Taking these concerns and public comments into consideration, the Federal Reserve determined that information on loan prices was critical to gaining insight

into the functioning of the higher-cost mortgage market. In the Board's amendments to the regulation that implements HMDA, Regulation C, we attempted to expand the HMDA data to permit evaluation of this market. The same amendments also required recording of information about the lien status of the loan, whether it was for manufactured housing, and whether it was subject to the Home Ownership Equity Protection Act.

The new data were first reported for loans originated in 2004. Although the edited aggregate HMDA data will not be available until September 2005, lenders, as of March 31, are required to make their individual data available to anyone who submits a request. Some community organizations have already obtained and analyzed the data of some large lenders and have published reports indicating they believe that the data reveal discrimination in pricing. Simultaneously, the Federal Reserve, together with the other agencies that make up the Federal Financial Institutions Examination Council and the Department of Housing and Urban Development, has been explaining to financial institutions and to the public the uses and limitations of the pricing data and how these data will be used by bank examiners.

General Data Issues

The collection of HMDA data is premised on two distinct assumptions. The first is that the mortgage markets work more efficiently when information is publicly available. HMDA data have been used to identify credit

demand that might otherwise have been overlooked. The analysis and conclusions drawn from the data have also encouraged the establishment of partnerships between lenders and community organizations to meet credit needs.

The other assumption is that data improve compliance with, and enforcement of, fair lending and consumer protection laws. The HMDA data are the first point of reference for fair lending examinations conducted by the Federal Reserve and the other banking regulators. Government agencies use HMDA data to assist in evaluating lender compliance with anti-discrimination laws–particularly the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA)–as well as other consumer protection laws. The data help examiners identify institutions, loan products, or geographic markets that show disparities in the disposition of loan applications by race, ethnicity, or other characteristics that require investigation under the fair lending laws. With the addition of price data for higher-priced loans, the agencies will be able to more easily identify price disparities that require investigation. If disparities are found to violate the ECOA or FHA, certain federal agencies are authorized to compel lenders to cease discriminatory practices and, among other remedies, obtain monetary relief for victims.

The public disclosure of price information under HMDA—in the form of spreads between the annual percentage rate (APR) on a loan and the rate on Treasury securities of comparable maturity—is designed

to ensure that the data continue to be useful in improving market efficiency and legal compliance. The APR represents the cost of credit to the consumer and captures the contract-based interest rate on a loan as well as the points and fees that consumers pay up front, converted to a percentage rate. But since these fees have to be amortized over the term of the loan to calculate the APR, and since interest rates vary over time, even the APR can be difficult to use as a basis of comparison across loans.

Because of interest-rate fluctuations, the HMDA rules require lenders to report the difference between the APR and the rate on Treasury securities of comparable maturity for any loans with rate spreads that exceed prescribed thresholds. For first-and second-lien loans, the thresholds are 3 percentage points and 5 percentage points above the Treasury security of comparable maturity, respectively. These particular thresholds were chosen to exclude the reporting of the vast majority of prime-rate loans and include the vast majority of the subprime-rate loans, minimizing the burden of the data collection on lenders while providing information on that portion of the market where concern about consumer abuse is most prevalent.

Although the addition of the price data significantly increases the robustness of HMDA data, the data alone do not prove discrimination. Instead, the data will be used as a screen to identify any aspects of the higher-priced end of the mortgage market that warrant closer scrutiny. The new HMDA data are clearly limited: they

do not include credit scores, loan-to-value ratio, or consumer debt-to-income ratio–all factors relevant to the cost of credit. Because these important determinants of price are missing, one cannot draw definitive conclusions about whether particular lenders discriminate unlawfully or take unfair advantage of consumers based solely on a review of the HMDA data. The new data will be useful to examiners in identifying particular loan products or geographic areas with significant pricing disparities and establishing one or more focal points for a pricing analysis that would include a review of all the factors relevant to a particular institution's pricing decisions.

The Board did consider adding other data elements relevant to pricing to the HMDA collection. For each possible new data item, we weighed the potential benefits and costs. On the basis of that analysis and careful consideration of public comments, we decided not to add more factors. In addition to the cost to lenders of collecting additional data, more data being made publicly available would create very real privacy concerns. As it stands, many of the HMDA data fields are unique and can be matched with other information to determine the identity of individual borrowers. Given the costs and limitations of collecting additional data, we felt that the potential for further privacy losses outweighed the usefulness of the additional data.

It is always possible that banks could disclose additional information on their own, but even this is questionable from a legal standpoint. The recent Fair Credit

Reporting Act limits financial institutions' ability to share consumer reports (such as credit scores) with third parties.

Regardless, the new data still offer the public and supervisory agencies charged with enforcement of the fair lending laws a better screening tool than was previously available. Until now, in determining whether a lender is discriminating in its pricing decisions, examiners have relied on several factors: the relationship between loan pricing and compensation of loan officers or brokers; lender policies giving loan officers broad pricing discretion; the use of empirically based and statistically sound risk-based pricing systems; disparities among prices quoted or charged to applicants who differ in their protected characteristics (such as race); and consumer complaints alleging price discrimination. These data will still be used, but the APRs will make the high-cost loan assessments much more precise.

Although discussions of the new HMDA pricing data have just begun, some outcomes should be anticipated. First, a debate will continue about what the HMDA data say about the lending practices of individual institutions. Some community groups have already publicized their analysis of the data provided by individual institutions, and those institutions have responded. The attorney general for New York is also reviewing the data of several institutions. I anticipate that these inquiries and the conclusions drawn from them will continue for several months.

Second, lenders can gain an increased awareness of the lending and pricing practices of their organizations, and of their competitors, through analysis of HMDA data. As a result, lenders may take opportunities to compete in areas where the data show concentrations of high-priced lending. Competitive pressures in such markets should increase efficiency in pricing, ensuring that prices for mortgages are commensurate with risk and do not just reflect an absence of competition.

Third, new and strengthened collaborations should emerge among lenders, community groups, realtors, and other participants in the real estate market. As lenders seek to enter new markets, or to better serve their existing markets, the groups that have an intimate knowledge of their communities will be viewed as valuable partners.

Finally, increased importance will be placed on the value of financial education to help consumers shop for and obtain the mortgage loan that represents the best price and terms for their financial situation and needs. The broad array of mortgage loan products makes choosing difficult, even for those with financial savvy. The choices are substantially more confusing for those with credit-impaired histories or those who are unfamiliar with the different types of financial service providers and products. Consumers are often bewildered by the mortgage credit process, and the consequences of poor choices or misunderstanding or misinformation can have lasting effects on their financial well-being.

An Early Look at the Data

As I said earlier, as of March 31, lenders have been required to make their individual HMDA data available. Many press reports have discussed these data and there is already a vigorous debate about what the data do, and will, show.

The Federal Reserve is now editing the data, and its reports will not be complete until September. Until then, we can only provide a broad preview of the overall picture. In 2004, some 8,800 lenders reported 37 million loan applications, compared with 8,100 lenders with 42 million loan applications in 2003. The drop in the number of loan applications reflects the slowing of the refinance market last year. The increase in the number of lenders is partly the result of the expanded coverage of the Board's amendments, but it could also suggest increasing competition in the home mortgage industry.

Regarding subprime lending, back in 1994 the subprime market, defined as high-cost mortgage loans, amounted to $35 billion, or 5 percent of total mortgage originations. By 2004, the subprime market had exploded to $530 billion, or 19 percent of total mortgage originations. The annual subprime market growth rate over this time was a whopping 27 percent.

The initial data also suggest that prevalence of higher-priced loans differs notably across racial and ethnic groups. As some press accounts have implied, the data indicate that blacks and Hispanics are more likely to

take out higher-priced loans than non-Hispanic whites, and that Asians are the least likely to have higher-priced loans. These preliminary data also seem to indicate that the actual prices paid by those taking out higher-priced loans are about the same for different racial groups.

Until the editing process is complete, more details cannot be provided. Needless to say, everyone will have an opportunity to review the final data when they are released in September.

Conclusion

In closing, I cannot emphasize enough the importance of your role. By understanding the potential usefulness and limitations of the data, and conveying those messages clearly, we can promote a more efficient market and compliance with anti-discrimination laws without unfairly tarnishing the reputations of particular lenders. No one will be served if lenders are unwilling to enter, or remain in, certain higher-priced segments of the market. The most effective way to lower the cost of credit to higher-risk borrowers is to promote a competitive marketplace. And one of the most effective ways of ensuring competition is to make data available.

EXHIBIT E

NEWS RELEASE

Comptroller of the Currency
Administrator of National Banks NR 2005-52

FOR IMMEDIATE RELEASE Contact: Kevin Mukri
May 19, 2005 (202) 874-5770

Acting Comptroller of the Currency Julie L. Williams Issues Statement Responding to New York Attorney General

WASHINGTON – Acting Comptroller of the Currency Julie L. Williams issued the attached *statement* today in response to comments by New York Attorney General Eliot Spitzer.

# # #

The Office of the Comptroller of the Currency was *created by Congress to charter national banks, to oversee a nationwide system of banking institutions, and to assure that national banks are safe and sound, competitive and profitable, and capable of serving in the best possible manner the banking needs of their customers.*

Statement by Acting Comptroller Julie L. Williams In Response to Comments By Eliot Spitzer

I was surprised and disappointed to see what I had understood to be a personal conversation recounted as part of a speech delivered by Attorney General Spitzer. I did indeed call Attorney General Spitzer. The purpose of my reaching out to him was to determine how each of us could fulfill our respective roles in overseeing laws that protect against lending discrimination in an efficient and complementary fashion. We had agreed to talk further.

Last year, many months before the Attorney General became involved in this issue, I made absolutely clear that if the OCC receives evidence – from Home Mortgage Disclosure Act (HMDA) reports or any other credible source – suggesting that violations of the fair lending laws might be taking place at an institution under our jurisdiction, we will increase the level of our supervisory oversight accordingly, and that if we discover that discriminatory practices have in fact taken place, we will respond appropriately and forcefully.

Also, last year, we began a process of reviewing preliminary HMDA data. That process has continued this year as additional data have become available and data integrity checks are being completed, and we are undertaking the extensive statistical analysis necessary to evaluate that data. Based on that analysis, if additional work is needed, including case-by-case reviews of credit decisions on individual borrowers, we

will do it. If our work shows that supervisory action is needed, we will take it.

If Attorney General Spitzer is suggesting by his public comments that he would undertake duplicative work in connection with institutions currently under review by the OCC, that activity would potentially disrupt and certainly impede our ability to conduct our exam work promptly and efficiently – a result neither of us should want.

Such activity by the Attorney General also would be inconsistent with the Attorney General's own position about his jurisdiction. In litigation filed in Federal courts, the Attorney General has acknowledged that *several* federal laws at least preclude state officials from examining or taking administrative enforcement measures against national banks.

According to published reports, the Attorney General believes that federal agencies have been "beaten down," and "neutered," so that they are incapable of fulfilling their fundamental mandate, and have been "sapped of the desire" to do so. Let me be very clear, on behalf of the OCC, that I completely reject that characterization. And let me also be very clear that the OCC is absolutely committed to assuring that the national banking system is free of lending discrimination of any sort.

Citizens of all states in the nation are best served when the resources of government are deployed most efficiently and effectively.

This should be our mutual goal. For our part, we at the OCC will continue to seek a constructive dialogue with Attorney General Spitzer to assure that as we pursue our respective work, lending standards by banks and non-banks alike are free of the stain of discrimination. The OCC will take whatever steps are needed to assure that the lending practices in the national banking system are reviewed thoroughly, carefully and fairly.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. _____

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

250 E Street, S.W.
Washington, D.C. 20219

Plaintiff,

v.

ELIOT SPITZER, in his official capacity as
Attorney General for the State of New York,

Defendant.

120 Broadway
New York City, NY 10271

COMPLAINT FOR DECLARATORY RELIEF,
PRELIMINARY INJUNCTION AND
PERMANENT INJUNCTION

Office of the Comptroller of the Currency,
250 E St. SW,
Washington, DC 20219
(202) 874-5280
(202) 874-5279 (facsimile)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Office of the Comptroller of the Currency ("OCC"), hereby alleges for its complaint as follows:

Jurisdiction and Venue

1. This is a civil action for declaratory relief under 28 U.S.C. § 2201, for injunctive relief, and for other appropriate relief under 28 U.S.C. § 2202.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it arises under Article VI, Clause 2 of the United States Constitution and 12 U.S.C. §§ 24(Seventh) and 484, and pursuant to 28 U.S.C. § 1345 because the OCC, a bureau of the United States Department of Treasury, is the plaintiff. The OCC is statutorily authorized to litigate in its own behalf and is the appropriate plaintiff to bring this action pursuant to 12 U.S.C. § 93(d).

3. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the defendant is located in this district.

Parties

4. Plaintiff OCC is a bureau within the United States Department of the Treasury charged with broad responsibility for the chartering and oversight of national banks organized under the National Bank Act. Under the National Bank Act and other federal banking

laws, unless otherwise provided by federal law, the OCC has exclusive licensing, regulatory, supervisory, examination, and enforcement authority with respect to national banks' compliance with federal and non-preempted state laws. 12 U.S.C. §§ 24(Seventh), 484(a), 1818(b); *see also* 12 C.F.R. § 7.4000.

5. Defendant Eliot Spitzer is sued in his official capacity as the Attorney General for the State of New York. As such, he is the state official generally charged under New York law with enforcing state laws on behalf of the people of the State of New York.

The Federal Banking Laws and OCC Regulations

Visitorial Exclusivity

6. National banks are federally chartered institutions created under the National Bank Act and governed by federal law.

7. In 12 U.S.C. § 484, which remains substantially unchanged since its enactment in 1864, Congress strictly limited the exercise of "visitorial" authority over national banks by providing that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. § 484(a).

8. Congress authorized the OCC to "make a thorough examination of all the affairs" of any national bank, 12 U.S.C. § 481, but Section 484 generally forbids any assertion of visitorial authority by state officers to supervise or examine national banks and prohibits state authorities from inspecting the records of national banks or bringing enforcement actions against national banks, except as specifically authorized by federal law.

9. Pursuant to its regulation-writing authority under 12 U.S.C. § 93a, the OCC has adopted 12 C.F.R. § 7.4000, implementing the statutory prohibition found in 12 U.S.C. § 484. That regulation states that "[u]nless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(a)(3).

10. Although Section 484 provides that national banks are subject to such visitorial powers as are vested in the courts of justice, "[t]his exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(b)(2).

11. Pursuant to 12 U.S.C. § 24(Seventh) and 12 U.S.C. § 93a, the OCC has issued a regulation that permits national banks to "conduct in an operating

subsidiary activities that are permissible for a national bank to engage in directly * * * ", 12 C.F.R. § 5.34(e)(1), and a regulation explaining that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank." 12 C.F.R. § 7.4006.

12. Under the OCC's interpretation of 12 U.S.C. § 484 and 12 C.F.R. §§ 7.4000 and 7.4006, the OCC's visitorial exclusivity applies to national bank operating subsidiaries just as it does to national banks. *Wachovia Bank, N.A. v. Burke,* 319 F. Supp. 2d 275 (D. Conn. 2004), *appeal pending* 2nd Cir. No. 04-3770; *Wells Fargo Bank, N.A. v. Boutris,* 252 F.Supp. 2d 1065 (E.D. Cal 2003) & *National City Bank of Indiana v. Boutris,* 2003 WL 21536818 (E.D. Cal. No. 03-655, July 2, 2003), *consolidated for appeal,* (9th Cir., Nos. 0-3-16194, 03-16197, 01-16461); *Wachovia Bank N.A. v. Watters,* 334 F. Supp. 2d 957 (W.D. Mich. 2004); *appeal pending* 6th Cir. No. 04-2257; *National City Bank of Indiana v. Turnbaugh,* 367 F. Supp. 2d 805 (D. Md. 2005) notice of appeal filed June 3, 2005.

13. Congress has granted the OCC broad authority to take administrative enforcement actions against national banks and affiliated parties for violations of federal law and any applicable state laws. 12 U.S.C. §§ 93, 1818.

14. To the extent that a state law is not preempted by federal law, the OCC enforces that state law with

respect to national banks and their operating subsidiaries to the exclusion of state officials. 12 U.S.C. §§ 36(f), 484 and 12 C.F.R. §§ 7.4000 and 7.4006; *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980).

15. The OCC does not argue that the substantive provisions of New York State Executive Law § 296-a are preempted by federal law, but rather that the OCC, not the Defendant, enforces those provisions as applied to nationally chartered banks and their operating subsidiaries.

Interest of the OCC

16. The OCC is charged with plenary supervision of the national banking system. The OCC's visitorial exclusivity is crucial to the integrity of that federal regime. The OCC is also responsible for ensuring that national banks have the opportunity to exercise fully the powers granted them under federal law, consistent with principles of safety and soundness, free from state direction and control except as federal law provides. Defendant's actions constitute a violation of federal law and interference with the OCC's authority over the national banking system, actual harms caused by Defendant and redressable by action of this Court. *First Union Nat'l Bank v. Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999). For the same reasons, the OCC is threatened with irreparable harm within the meaning of the applicable standard for injunctive relief. *Id.*

The Present Controversy

17. Citibank, National Association, is a national bank charted by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office in New York, New York. It is a wholly-owned subsidiary of Citicorp, Inc., which is a subsidiary of Citigroup, Inc.

18. JP Morgan Chase Bank, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office in Columbus, Ohio. It is a wholly-owned subsidiary of JP Morgan Chase & Company.

19. HSBC Bank USA, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office in Wilmington, Delaware. It is a wholly-owned subsidiary of HSBC USA, Inc. HSBC Bank USA, N.A., exercises its power under federal law to conduct real estate lending through HSBC Mortgage Corporation, an OCC-licensed operating subsidiary of the bank.

20. Wells Fargo Bank, National Association, is a national bank chartered by the OCC in accordance with 12 U.S.C. §§ 26, 27, and 35, with its main office located in Sioux Falls, South Dakota. It is a wholly-owned subsidiary of Wells Fargo & Company. During a portion of calendar year 2004, Wells Fargo Bank, N.A., exercised its power to conduct real estate lending under federal law through Wells Fargo Home Mortgage, Incorporated, an OCC-licensed operating subsidiary.

21. The OCC conducts continuous examinations of Citibank, N.A., JP Morgan Chase, N.A., HSBC USA Bank, N.A., and Wells Fargo Bank, N.A., and their operating subsidiaries, through teams of resident examiners, supplemented by subject-matter experts, in accordance with 12 U.S.C. § 481, and the OCC can compel these national banks and their operating subsidiaries to comply with applicable federal and state law through enforcement actions authorized by 12 U.S.C. §§ 93, 504, and 1818.

22. The OCC enforces national bank compliance with the requirements of the Equal Credit Opportunity Act ("ECOA") using its enforcement authority under 12 U.S.C. § 1818. 15 U.S.C. § 1691c(a)(l). ECOA gives the states no enforcement role with respect to the activities of national banks.

23. Pursuant to the federal Home Mortgage Disclosure Act ("HMDA"), certain depository institutions, as defined in 12 U.S.C. § 2802(2), are required to maintain records and make available to the public data derived from those records regarding applications, origination, and purchases of home purchase loans, home improvement loans, and loan refinancings for each calendar year. 12 U.S.C. § 2803.

24. In accordance with the directions of Congress, the Board of Governors of the Federal Reserve System (the "FRB") has issued regulations, codified at 12 C.F.R. Part 203, regarding the maintenance and disclosure of data required to be collected under the HMDA. Those

regulations specify the types of information that must be collected as well as the types of information that must be made public.

25. Citibank, N.A., JP Morgan Chase, N.A., HSBC USA Bank, N.A., and Wells Fargo Bank, N.A. filed their HMDA loan application registers ("LARs") for calendar year 2004 in accordance with 12 C.F.R. § 203.5(a)(1) and App. A (II).

26. In accordance with 12 C.F.R. § 203.5(c), Citibank, N.A., JP Morgan Chase, N.A., HSBC USA Bank, N.A., and Wells Fargo Bank, N.A., were required, for requests received on or before March 1, 2005, to make available to the public by March 31, 2005, specific HMDA data of their respective institutions after removing information that could identify particular loan applications. For requests received after March 1, 2005, HMDA reporters are required to make their modified LARs available within 30 calendar days. 12 C.F.R. § 203.5(c).

27. On April 6, 2005, Jeffrey K. Powell, an Assistant Attorney General in the Office of the Attorney General, sent a letter to Citigroup requesting its HMDA LARs as well as non-public information concerning the operation of Citigroup's mortgage lending programs, including the mortgage lending operations of any Citigroup subsidiary that is a national bank.

28. On April 19, 2005, Dennis D. Parker, the Bureau Chief for the Civil Rights Bureau of the Office of the

Attorney General, sent a letter to HSBC USA, N.A. Citing reports of disparities in the pricing of loans between white borrowers and African-American and Hispanic borrowers, the letter stated that the alleged disparities "unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a." After stating that a preliminary inquiry had been commenced to determine the causes of the reported disparities, the letter stated: "In lieu of issuing a formal subpoena, we write to request that HSBC provide our office with certain information regarding its HMDA reportable loans and applications." The letter requested that HSBC USA, N.A., provide its HMDA LARs as well as non-public information concerning this national bank's mortgage lending operations, including the operations of its operating subsidiaries, in connection with the inquiry into whether violations of federal and state anti-discrimination laws had occurred.

29. On April 19, 2005, Dennis D. Parker, the Bureau Chief for the Civil Rights Bureau of the Office of the Attorney General, sent a letter to Wells Fargo & Company. Citing reports of disparities in the pricing of loans between white borrowers and African American and Hispanic borrowers, the letter stated that the alleged disparities "unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a." After stating that a preliminary inquiry had been commenced to

determine the causes of the reported disparities, the letter stated: "In lieu of issuing a formal subpoena, we write to request that Wells Fargo voluntarily provide our office with certain information regarding its HMDA reportable loans and applications." The letter requested that Wells Fargo & Company provide its HMDA LARs as well as non-public information concerning its mortgage lending operations, including the operations of its national bank subsidiaries and bank operating subsidiaries, in connection with the inquiry into whether violations of federal and state anti-discrimination laws had occurred.

30. On April 20, 2005, Dennis D. Parker, the Bureau Chief for the Civil Rights Bureau of the Office of the Attorney General, sent a letter to JP Morgan Chase & Company. Citing reports of disparities in the pricing of loans between white borrowers and African-American and Hispanic borrowers, the letter stated that the alleged disparities "unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a." After stating that a preliminary inquiry had been commenced to determine the causes of the reported disparities, the letter stated: "In lieu of issuing a formal subpoena, we write to request that JP Morgan Chase provide our office with certain information regarding its HMDA reportable loans and applications." The letter requested that JP Morgan Chase & Company provide its HMDA LARs as well as non-public information concerning JP Morgan Chase & Company's mortgage lending operations, including the operations of any subsidiary

that is a national bank, in connection with the inquiry into whether violations of federal and state anti-discrimination laws had occurred.

31. Pursuant to federal law, Defendant may obtain from national banks their HMDA LARs that must be made available to the public.

32. In a letter dated April 19, 2005, Citigroup responded to the April 6, 2005 letter from Jeffrey K. Powell by providing its HMDA LARs. and certain non-public information concerning the operation of Citigroup's mortgage lending program, including the operations of Citigroup's national bank subsidiaries.

33. JP Morgan Chase & Company responded to the April 20, 2005 letter from Dennis D. Parker by providing its HMDA LARs and certain other public information concerning its mortgage lending operations, including the operations of its national bank subsidiaries.

34. In a letter dated April 26, 2005, HSBC USA, N.A., responded to the April 19, 2005 letter from Dennis D. Parker by providing its HMDA LARs and certain other public information.

35. In a letter dated May 2, 2005, Wells Fargo & Company responded to the April 19, 2005 letter from Dennis D. Parker by providing its HMDA LARs for all subsidiaries, including the holding company's national banks and their operating subsidiaries. In a letter dated May 16, 2005, Wells Fargo & Company provided certain

non-public information regarding its subsidiaries that were not national banks or bank operating subsidiaries. Wells Fargo & Company declined to provide non-public information regarding its national bank subsidiaries and their operating subsidiaries.

36. On June 16, 2005, Dennis Parker notified representatives of Wells Fargo & Company that its failure to provide the documents requested in his April 19, 2005 letter concerning the real estate lending activities of the national bank subsidiaries of the bank holding company was likely to result in one of two actions by the Defendant: a formal subpoena or initiation of enforcement proceedings to investigate the reported discrepancies identified in the letter.

Claim for Relief

37. Plaintiff incorporates and realleges each and every allegation contained in paragraphs 1-36 of this Complaint as though fully set forth herein.

38. Defendant's demand for the nonpublic records of national banks or their operating subsidiaries concerning their mortgage lending operations in aid of Defendant's assertion of authority to investigate the compliance of national banks and their operating subsidiaries with federal or state law represents an attempt to exercise visitorial power that is expressly prohibited by 12 U.S.C. § 484 and OCC regulations.

39. Pursuant to 12 U.S.C. §§ 484, 36(f), and 1818 and 12 C.F.R. §§ 5.34 and 7.4006, only the OCC may enforce with respect to national banks and their operating subsidiaries New York State Executive Law § 296-a, and other non-preempted state laws affecting the banking activities of national banks and their operating subsidiaries.

40. Defendant's assertion of visitorial authority over national banks and their operating subsidiaries represents an interference with the OCC's plenary authority to ensure the efficiency and integrity of the federal national bank supervisory regime.

41. Defendant's violation of the federal law interferes with the OCC's ability to carry out its responsibilities under federal law, causing irreparable harm to the OCC's administration of the national banking system.

42. Defendant's interference with the OCC's ability to carry out its responsibilities under federal law creates a justiciable controversy between the OCC and Defendant.

43. The OCC has no adequate remedy at law under which it may obtain redress for the interference with its supervisory and regulatory authority caused by Defendant's unlawful behavior.

Prayer for Relief

WHEREFORE, the OCC requests that judgment be entered in this action:

1. Declaring that Defendant, and all those acting under his direction or in concert with him, may not demand, examine, or inspect the books and records of national banks or their operating subsidiaries, except as specifically authorized by federal law;

2. Declaring that Defendant, and all those acting under his direction or in concert with him, has no authority to enforce against national banks and their operating subsidiaries the Equal Credit Opportunity Act, New York State Executive Law § 296-a, or any other law, rule or regulation concerning the banking activities of national banks or their operating subsidiaries, except as specifically authorized by federal law;

3. Permanently enjoining Defendant, and all those acting under his direction or in concert with him, from demanding, examining or inspecting the books and records of any national banks or their operating subsidiaries, except as specifically authorized by federal law;

4. Permanently enjoining Defendant, and all those acting under his direction or in concert with him, from instituting any enforcement activities against national banks or their operating subsidiaries, except as specifically authorized by federal law;

6. Permanently enjoining Defendant, and all those acting under his direction or in concert with him, from any further usurpation of OCC's exclusive authority to supervise and examine national banks or their operating subsidiaries, except as specifically authorized by federal law; and

7. Granting such other and further relief as this Court may deem just and proper.

Respectfully submitted,

By: /s/ Yvette Rivera
YVETTE RIVERA (YR 1989)
Office of the Comptroller
of the Currency
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June 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 05 CV 5636

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff,

v.

ELIOT SPITZER, in his official capacity as
Attorney General for the State of New York,

Defendant.

DECLARATION OF
GRACE E. DAILEY

I, Grace E. Dailey, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. For the past three years, I have served as a Deputy Comptroller for Large Bank Supervision in the Office of the Comptroller of the Currency ("OCC"). In that position, I have responsibility for overseeing examiners charged with supervising national banks in the OCC Large Bank Program, including Citibank, N.A., and HSBC Bank USA, NA. As Deputy Comptroller, I

am generally familiar with all aspects of supervising national banks.

2. The OCC's effectiveness in supervising national banks and ensuring their safe and sound operations depends, among other things, upon a clear understanding by national banks of the OCC's supervisory expectations and the OCC's authority as the sole administrator of the national banking system.

3. For institutions that are part of the national banking system and their customers, actions by state authorities to inspect the records of, examine, supervise, police or direct national banks creates confusion concerning the OCC's supervisory role by suggesting that states may lawfully exercise visitorial powers over the banking activities of national banks that are subject to OCC supervision.

4. Any suggestion that the banking business of national banks may also be supervised, directed, and policed by state authorities undermines the OCC's authority and ability to implement its supervisory responsibilities and the federal policy of the national banking system. This concern especially holds true to the extent that state authorities threaten enforcement proceedings to coerce national banks to comply with state demands that conflict with federal supervisory direction.

5. In the present situation, the actions of the New York Attorney General's Office subject national banks to unauthorized visitorial demands, undermining the OCC's authority to supervise their banking activities in accordance with the regulatory regime established by Federal law. Implied in the New York Attorney General's unauthorized visitorial demands of Citibank, N.A., HSBC Bank U.S.A., N.A., JP Morgan Chase Bank, N.A., and Wells Fargo Bank, N.A., is a potential threat that the New York Attorney General's Office will take actions that may have adverse financial or reputation consequences for these national banks.

6. As Deputy Comptroller, I have been informed that the Acting Comptroller attempted to reach agreement with the New York Attorney General regarding their respective responsibilities with regard to the banking activities of national banks and their operating subsidiaries, but that those efforts failed. It is therefore plain to me that, unless the absence of authority for the New York Attorney General to exercise visitorial power over national banks and their operating subsidiaries is established, the OCC's ability to conduct its supervisory responsibilities will be irreparably harmed.

I declare under penalty of perjury that the foregoing is true and correct.

6/16/05
Date

/s/ Grace E. Dailey
Grace E. Dailey
Deputy Comptroller
Large Bank Supervision

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant.

ANSWER

Defendant Eliot Spitzer, the Attorney General of the State of New York (the "Attorney General") answers the complaint of plaintiff The Clearing House Association, L.L.C. ("Clearing House") as follows:

1. Admits that Congress has enacted the National Bank Act, codified at 12 U.S.C. § 484, and respectfully refers the Court to the complete text of that statute for an accurate and complete statement of its terms and denies any allegations in paragraph 1 of the complaint that are inconsistent therewith. Admits that the Office of the Comptroller of the Currency (the "OCC") has

issued regulations purporting to interpret the National Bank Act, codified at 12 C.F.R. § 7.4000(a)(1), respectfully refers the Court to the complete text of those regulations for an accurate and complete statement of their terms, denies any allegations in paragraph 2 that are inconsistent therewith, and further denies that such regulations are lawful or proper, or are otherwise a reasonable interpretation of the statute. Denies the allegations in the third sentence of paragraph 1 of the complaint and alleges that the Attorney General has sent letters to several banks requesting that they voluntarily provide certain information regarding their lending practices, and further alleges that some of the banks have complied with the requests and other have declined to do so. Denies the allegations contained in the fourth sentence of paragraph 1 of the complaint, except admits that Clearing House purports to seek injunctive relief on behalf of some of its members.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 2 of the complaint. Denies the allegations in the third sentence of paragraph 2 of the complaint.

3. Denies the allegations in paragraph 3 of the complaint.

4. Denies the allegations in paragraph 4 of the complaint, except admits that the Attorney General sent letters to national banks from his office in this District

and that some of those letters were sent to New York offices of such national banks.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 5 of the complaint, except admits that the Clearing House is a Delaware limited liability company and has an office at 100 Broad Street, New York, New York. Denies the allegations in the third sentence of paragraph 5 of the complaint, and alleges that the Attorney General has sent letters to HSBC Bank USA, JP Morgan Chase Bank, and Wells Fargo & Co. (the "Clearing House Members") requesting that they voluntarily provide certain information regarding their lending practices. Denies the allegations in the fourth sentence of paragraph 5 of the complaint.

6. Admits that the Clearing House purports to sue the Attorney General in his official capacity. Denies the allegations set forth in the second sentence of paragraph 6 of the complaint, except admits that the Attorney General maintains offices at The Capitol, Albany, New York and at 120 Broadway, New York, New York and that the Attorney General's letters seeking voluntary disclosure of certain lending information were sent from his New York City office.

7. Admits that the Clearing House Members are federally chartered banks. Denies the allegations in the second sentence of paragraph 7, except admits that the Clearing House Members conduct business, in part, through operating subsidiaries.

8. Denies the allegations in the first sentence of paragraph 8, except admits that the Clearing House Members engage in residential mortgage lending either directly or indirectly through operating subsidiaries, affiliates and other entities. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the second and third sentences of paragraph 8 of the complaint.

9. Admits that paragraph 9 of the complaint purports to summarize regulations promulgated under the Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801 et seq. ("HMDA"), and respectfully refers the Court to the complete text of Regulation C, 12 C.F.R. Part 203 for an accurate and complete statement of its terms and denies any allegations in paragraph 9 of the complaint that are inconsistent therewith.

10. Admits that Dennis Parker, Bureau Chief of the Civil Rights Bureau of the New York State Attorney General's Office sent a letter, dated April 19, 2005, to Wells Fargo & Co. (the "Wells Fargo Letter") and respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 10 of the complaint that are inconsistent therewith.

11. Admits that the Wells Fargo Letter requested that the company voluntarily provide certain information regarding its lending practices, and respectfully refers the Court to the complete text of that letter for an

accurate and complete statement of its contents and denies any allegations in paragraph 11 of the complaint that are inconsistent therewith.

12. Admits that Mr. Parker sent a letter dated April 19, 2005, to HSBC Bank and respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 12 of the complaint that are inconsistent therewith.

13. Admits that Mr. Parker sent a letter dated April 20, 2005, to JP Morgan Chase & Co. and respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 13 of the complaint that are inconsistent therewith.

14. Admits that the first sentence of paragraph 14 of the complaint purports to summarize certain requirements of Regulation C, promulgated pursuant to HMDA, and respectfully refers the Court to the complete text of Regulation C, 12 C.F.R. Part 203 for an accurate and complete statement of its terms and denies any allegations in the first sentence of paragraph 14 that are inconsistent therewith. Denies knowledge or information sufficient to form a belief as to the allegations in the second sentence of paragraph 14 of the complaint, except admits that the Clearing House Members have provided their 2004 HMDA data to the Attorney General.

15. Denies the allegations in the first sentence of paragraph 15 of the complaint, except admits that some of the information requested by the Attorney General is non-public. Denies the allegations in the second sentence of paragraph 15 of the complaint, and alleges that some Clearing House Members, specifically HSBC Bank and Wells Fargo & Co., have provided some non-public information about their lending practices to the Attorney General.

16. Denies the allegations in paragraph 16 of the complaint, except admits that Mr. Parker had a conversation with a Wells Fargo Mortgage Division representative on or about May 19, 2005, regarding the Attorney General's requests for information about Wells Fargo's lending practices.

17. Denies the allegations in paragraph 17 of the complaint, except admits that Mr. Parker had a conversation with a Wells Fargo Mortgage Division representative on or about June 6, 2005, regarding the Attorney General's requests for information about Wells Fargo's lending practices.

18. Denies the allegations in paragraph 18, and alleges that Mr. Parker informed Wells Fargo's representative during the June 6, 2005 conversation that the Attorney General wanted to review and analyze the data that the bank claimed would explain the racial disparities found in its 2004 HMDA data.

19. Denies the allegations in paragraph 19 of the complaint.

20. Denies the allegations in paragraph 20 of the complaint.

21. Paragraph 21 of the complaint states a legal conclusion to which the Attorney General need not respond.

22. Denies the allegations in the first sentence of paragraph 22 of the complaint which purport to interpret the National Bank Act, codified at 12 U.S.C. § 484(a), refers the Court to the complete text of that provision for an accurate and complete statement of its terms and denies any allegation in paragraph 22 of the complaint that is inconsistent therewith. The second sentence of paragraph 22 of the complaint states a legal conclusion to which the Attorney General need not respond.

23. Denies the allegations in paragraph 23 of the complaint which purport to interpret the National Bank Act, respectfully refers the Court to the complete text of 12 U.S.C. § 484(b) for an accurate and complete statement of its terms and denies any allegation in paragraph 23 of the complaint that is inconsistent therewith.

24. Admits that the OCC issued regulations purporting to interpret 12 U.S.C. § 484, respectfully refers the Court to the complete text of those

regulations for an accurate and complete statement of their terms, denies any allegation in paragraph 24 of the complaint that is inconsistent therewith, and further alleges that the OCC's regulations are unlawful, improper and an unreasonable interpretation of Section 484 of the National Bank Act.

25. Paragraph 25 of the complaint states a legal conclusion to which the Attorney General need not respond.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first, second and third sentences of paragraph 26 of the complaint, except admits that the OCC has authority, albeit non-exclusive, to enforce federal and state anti-discrimination and other laws against national banks. Denies the fourth sentence of paragraph 26 of the complaint.

27. Denies any allegations not expressly admitted.

28. Denies that the Clearing House is entitled to any relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

This Court lacks jurisdiction over the subject matter of the complaint.

SECOND AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiff lacks associational standing to assert the claims set forth in the complaint.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff fails to allege cognizable harm sufficient to warrant injunctive relief.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of waiver, estoppel and laches.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of acceptance and ratification.

SEVENTH AFFIRMATIVE DEFENSE

The Attorney General reserves the right to rely on such other and further defenses and affirmative defenses as may be supported by facts to be determined through full and complete discovery.

WHEREFORE, Defendant, Eliot Spitzer, respectfully demands judgment dismissing the complaint with prejudice and awarding costs and disbursements in connection with the defense of this suit, and granting such other and further relief as the Court may deem just and appropriate.

Dated: New York, New York
August 5, 2005

ELIOT SPITZER
Attorney General of the State
of New York
120 Broadway
New York, New York 10271
(212) 416-8041 (212) 416-8074

/s/ Dennis D. Parker

Dietrich L. Snell (DS-9692)
Deputy Attorney General
Thomas G. Conway (TC-9490)
Bureau Chief, Consumer Frauds
and Protection
Dennis D. Parker (DP-1531)
Bureau Chief, Civil Rights

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5636 (SDS)

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

ANSWER AND COUNTERCLAIM

Defendant Eliot Spitzer, the Attorney General of the State of New York (the "Attorney General") answers the complaint of plaintiff Office of the Comptroller of the Currency ("OCC") and alleges a counterclaim as follows:

1. Admits that the OCC purports to seek injunctive, declaratory and other appropriate relief.

2. Denies the allegations in the first sentence of paragraph 2 of the complaint, except admits that 28 U.S.C. § 1345 confers jurisdiction on this Court. Denies the allegations in the second sentence of paragraph 2 of the complaint, except admits that 12 U.S.C. § 93(d) authorizes the OCC to litigate on its own behalf.

3. Admits the allegations in paragraph 3 of the complaint.

4. Denies the allegations in the first sentence of paragraph 4 of the complaint, except admits that the OCC is a bureau within the United States Department of the Treasury. Denies the allegations in the second sentence of paragraph 4 of the complaint which purport to interpret 12 U.S.C. §§ 24, 484(a), 1818(b) and 12 C.F.R. § 7.4000, refers the Court to the complete text of those provisions and that regulation for an accurate and complete statement of their contents and denies any allegation in paragraph 4 of the complaint that is inconsistent therewith.

5. Admits the allegations in paragraph 5 of the complaint.

6. Admits the allegations in paragraph 6 of the complaint and further alleges that national banks are also subject to non-preempted state law.

7. Denies the allegations in paragraph 7 of the complaint which purport to interpret the National Bank Act, codified at 12 U.S.C. § 484(a), refers the Court to the complete text of that provision for an accurate and complete statement of its contents and denies any allegation in paragraph 7 that is inconsistent therewith.

8. Denies the allegations in paragraph 8 of the complaint which purport to interpret the National Bank Act, codified at 12 U.S.C. §§ 481 & 484, refers the Court

to the complete text of those provisions for an accurate and complete statement of their contents and denies any allegation in paragraph 8 that is inconsistent therewith.

9. Admits that the OCC issued a regulation purporting to implement 12 U.S.C. § 484, respectfully refers the Court to the complete text of 12 C.F.R. § 7.4000 for an accurate and complete statement of its terms, denies any allegation in paragraph 9 of the complaint that is inconsistent therewith, and further alleges that 12 C.F.R. § 7.4000 is unlawful, improper and an unreasonable interpretation of Section 484 of the National Bank Act.

10. Denies the allegations in paragraph 10 of the complaint which purport to interpret 12 U.S.C. § 484 by referring to 12 C.F.R. § 7.4000(b)(2), respectfully refers the Court to the complete text of that statute for an accurate and complete statement of its terms, denies any allegation in paragraph 10 of the complaint that is inconsistent therewith, and further alleges that the OCC's regulation is unlawful, improper and an unreasonable interpretation of Section 484 of the National Bank Act.

11. Denies the allegations in paragraph 11 of the complaint, except admits that the OCC issued regulations codified at 12 C.F.R. §§ 5.34(e)(1) and 7.4006, and respectfully refers the Court to the complete texts of 12 C.F.R. §§ 5.34(e)(1) and 7.4006 for an accurate and complete statement of their terms and denies any

allegation in paragraph 11 of the complaint that is inconsistent therewith.

12. Paragraph 12 states a legal conclusion to which the Attorney General need not respond.

13. Denies the allegations in paragraph 13 of the complaint and respectfully refers the Court to the complete texts of 12 U.S.C. §§ 93 & 1818 for an accurate and complete statement of their terms and denies any allegations in paragraph 13 that are inconsistent therewith.

14. Denies the allegations in paragraph 14 of the complaint.

15. Admits that New York State Executive Law § 296-a is not preempted by federal law, and denies that the OCC, as a matter of law or practice, exclusively enforces the statute's provisions against nationally chartered banks and their operating subsidiaries.

16. Denies the allegations in paragraph 16 of the complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17 of the complaint, and alleges that Citibank, N.A., is a nationally chartered bank.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18 of the complaint, except admits that JP Morgan Chase Bank, N.A. is a nationally chartered bank.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19 of the complaint, except admits that HSBC Bank USA, N.A. is a nationally chartered bank.

20. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the complaint, except admits that Wells Fargo Bank, N.A. is a nationally chartered bank.

21. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21 of the complaint, and respectfully refers the Court to the complete texts of 12 U.S.C. §§ 93, 481, 504 & 1818 for an accurate and complete statement of their terms and denies any allegation in paragraph 21 of the complaint that is inconsistent therewith.

22. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 22 of the complaint. The second sentence of paragraph 22 of the complaint states a legal conclusion to which the Attorney General need not respond.

23. Admits that paragraph 23 of the complaint purports to summarize requirements of the Home

Mortgage Disclosure Act of 1975, respectfully refers the Court to the complete text of 12 U.S.C. §§ 2801 et seq. and their implementing regulations for an accurate and complete statement of their terms and denies any allegation in paragraph 23 of the complaint that is inconsistent therewith.

24. Denies knowledge or information sufficient to form a belief as to the truth of the paragraph 24, except admits that the Board of Governors of the Federal Reserve has issued regulations codified at 12 C.F.R. Part 203, and respectfully refers the Court to the complete text of 12 C.F.R. Part 203 for an accurate and complete statement of its terms and denies any allegation in paragraph 24 that is inconsistent therewith.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25 of the complaint.

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 26 of the complaint. Alleges that the second sentence of paragraph 26 apparently purports to summarize requirements of the Home Mortgage Disclosure Act of 1975, respectfully refers the Court to the complete text of 12 U.S.C. §§ 2801 et seq. and their implementing regulations for an accurate and complete statement of their terms and denies any allegation in paragraph 26 of the complaint that is inconsistent therewith.

27. Admits that Jeffrey K. Powell, an Assistant Attorney General in the Office of the New York State Attorney General, sent a letter dated April 6, 2005, to Citigroup, respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegation in paragraph 27 of the complaint that is inconsistent therewith.

28. Admits that Dennis D. Parker, Chief of the Civil Rights Bureau of the Office of the New York State Attorney General, sent a letter dated April 19, 2005, to HSBC USA, N.A., respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegation in paragraph 28 of the complaint that is inconsistent therewith.

29. Admits that Dennis D. Parker, Chief of the Civil Rights Bureau of the Office of the New York State Attorney General, sent a letter dated April 19, 2005, to Wells Fargo & Company, respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegation in paragraph 29 of the complaint that is inconsistent therewith.

30. Admits that Dennis D. Parker, Chief of the Civil Rights Bureau of the Office of the New York State Attorney General, sent a letter dated April 20, 2005, to JP Morgan Chase & Company, respectfully refers the Court to the complete text of that letter for an accurate

and complete statement of its contents and denies any allegation in paragraph 30 of the complaint that is inconsistent therewith.

31. Paragraph 31 states a legal conclusion to which the Attorney General need not respond.

32. Admits that Citigroup sent a letter to the Office of the Attorney General dated April 19, 2005, and respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 32 of the complaint that are inconsistent therewith.

33. Denies the allegations of paragraph 33 of the complaint, and alleges that Chase sent a letter dated May 2, 2005 to Dennis Parker, Chief of the Civil Rights Bureau of the Office of the New York State Attorney General, respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 33 of the complaint that are inconsistent therewith.

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 34 of the complaint, and alleges that Janet L. Burak, Senior Executive Vice President, General Counsel & Secretary, HSBC sent a letter dated April 26, 2005 to Dennis Parker, Chief of the Civil Rights Bureau of the Office of the New York State Attorney General, respectfully refers the Court to the complete

text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 34 of the complaint that are inconsistent therewith.

35. Denies the allegations in paragraph 35 of the complaint, and alleges that Wells Fargo Financial, Inc. sent a letter dated May 2, 2005 to Dennis Parker, Chief of the Civil Rights Bureau of the Office of the New York State Attorney General, respectfully refers the Court to the complete text of that letter for an accurate and complete statement of its contents and denies any allegations in paragraph 35 of the complaint that are inconsistent therewith.

36. Denies the allegations in paragraph 36 of the complaint, except admits that Mr. Parker had a conversation with a representative of Wells Fargo's Mortgage Division on or around June 16, 2005, regarding the Attorney General's requests for information about the lending practices of Wells Fargo & Company.

37. Repeats and realleges each and every denial in answer to paragraphs 1-36 of the complaint as if fully set forth in answer to paragraph 37 of the complaint.

38. Denies the allegations in paragraph 38 of the complaint.

39. Denies the allegations in paragraph 39 of the complaint.

40. Denies the allegations in paragraph 40 of the complaint.

41. Denies the allegations in paragraph 41 of the complaint.

42. Denies the allegations in paragraph 42 of the complaint.

43. Denies the allegations in paragraph 43 of the complaint.

44. Denies any allegations not expressly admitted.

45. Denies that the OCC is entitled to any relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff fails to allege any harm sufficient to warrant injunctive relief.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of waiver, estoppel and laches.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrines of acceptance and ratification.

FIFTH AFFIRMATIVE DEFENSE

The Attorney General reserves the right to rely on such other and further defenses and affirmative defenses as may be supported by facts to be determined through full and complete discovery.

COUNTERCLAIM:

ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 706(2)(A) & (C)

Attorney General Eliot Spitzer (the "Attorney General") herein asserts this counterclaim under 5 U.S.C. §§ 706(2)(a) & (c) to challenge regulations promulgated by the Office of the Comptroller of the Currency ("OCC") that are contrary to plain statutory language, congressional intent, and judicial precedent. The Attorney General seeks declaratory and injunctive relief to protect his authority to enforce non-preempted state laws on behalf of the people of the State of New York. In support, the Attorney General states and alleges as follows:

The National Banking Act

1. The National Banking Act ("NBA"), enacted in 1864, created national banks for the primary purpose of issuing the newly established national currency and fulfilling other public functions.

2. The NBA established the OCC, a bureau within the United States Department of Treasury, to "regulate the national currency" by preventing unsafe and unsound banking practices. Cong. Globe, 38th Cong. 1st Sess., 1432-33 (Apr. 7, 1864). The OCC is the exclusive superintendent of national banks and is responsible for ensuring the safety and soundness of national banks. The agency is charged with executing and ensuring compliance with federal banking laws and conducting banking examinations. *See* 12 U.S.C. §§ 1, 481, 1818. The OCC has the authority "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

3. Section 484(a) of the NBA provides: "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized."

4. Section 484 did not displace states' ability to bring judicial actions against national banks. In fact, national banks always have been subject to state laws,

except where such laws substantially impair or interfere with the operation of the banks or otherwise conflict with federal law. Section 484 did not divest states of their statutory and common law authority to enforce non-preempted laws against national banks. Indeed, until recently, the OCC had never objected to state enforcement of such laws.

The OCC's Improper Rulemaking

5. In a sharp departure from precedent and practice, the OCC promulgated rules in 1999 and 2004 that purported to strip the states of their well-established authority to go to court to enforce their non-preempted laws against national banks and take necessary investigative steps to determine if such a civil enforcement action is warranted. Those rules purported to "clarify" the terms "visitorial powers" and "vested in the courts of justice" as used in Section 484. 64 Fed. Reg. 60092, 60094 (Nov. 4, 1999); 69 Fed. Reg. 1895 (Jan. 13, 2004). The 1999 amendment defined the term "visitorial powers" to prohibit states from taking action against national banks to enforce "compliance with any applicable federal or state laws concerning" activities authorized by federal law. 12 C.F.R. § 7.4000(a). The 2004 amendment asserted that the "vested in the courts of justice" exception did not grant states the right to "compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. § 7.4000(b).

6. In its commentary accompanying the 2004 final rulemaking, the OCC asserted that its interpretation of Section 484 precludes states from filing lawsuits to enforce laws that relate to banking activities. 69 Fed. Reg. at 1899-1900. The OCC's rules thus would prohibit state enforcement of non-preempted fair lending and consumer protection laws against national banks.

7. The OCC's rulemaking directly contradicts the plain language of Section 484, congressional intent, and over 100 years of judicial precedent. The OCC has not articulated a rational basis for how shielding national banks from state enforcement of non-preempted laws will further their safety and soundness – the agency's primary mission. Indeed, the lengthy commentary accompanying the 2004 final rulemaking is bereft of policy justifications that relate at all to the business of banking, much less to safety and soundness considerations. The commentary never even mentions the phrase "safety and soundness," but instead purports to interpret judicial decisions in support of the agency's misreading of Section 484. 69 Fed. Reg. 1895. The OCC's expertise is limited to banking, and its attempt to usurp traditional judicial functions through the promulgation of regulations far exceeds the scope of the agency's delegated rulemaking authority.

8. The OCC's rulemaking also reflects an unreasonable policy choice. It unduly restricts state anti-discrimination and consumer protection efforts, contrary to public policy.

9. The OCC received a significant number of comments opposing the rule changes on the grounds that they were inconsistent with the plain language of Section 484, longstanding judicial precedent, and public policy. Notwithstanding those objections, the OCC promulgated the rules.

The OCC's Interference with the Attorney General's Discrimination in Lending Inquiry

10. Among its many mandates, the Office of the Attorney General ("OAG") is authorized to investigate and prosecute repeated fraudulent or illegal acts in the carrying on of a business and to investigate complaints of unlawful discrimination. New York Executive Law §§ 63(12), 297. Given the importance of fair access to credit, the OAG has repeatedly investigated complaints of fraud and discrimination by lending institutions, and has initiated legal proceedings to enforce state fair lending laws where necessary.

11. Pursuant to the authority conferred by Section 63(12) of the New York Executive Law, the OAG commenced a mortgage lending inquiry in April 2005 after an analysis of data disclosed under the Home Mortgage Disclosure Act ("HMDA") revealed substantial racial disparities in interest rates charged by various banks on New York State loans.

12. Among other things, the review of HMDA data found that African-American customers of certain national banks were substantially more likely than whites

to receive high interest rate loans. Specifically, HMDA data revealed that at Wells Fargo, African-American customers were 3 times more likely to receive high cost loans; at JP Morgan Chase and Citigroup, African-American customers were nearly 2 times more likely to receive high cost loans; and at HSBC, African American customers were about 1.5 times as likely to receive such loans.

13. On their face, these data established a *prima facie* case, under the federal Fair Housing Act and New York's Human Rights Law, of race-based discrimination in credit offerings. 42 U.S.C. § 3605(a); N.Y. Exec. L. § 296-a.

14. In response to these findings, the OAG sent letters to several banks, including national banks Citibank, JP Morgan Chase, Wells Fargo, and HSBC, requesting that they provide information concerning, among other things, the factors the banks consider and the policies they follow when determining the interest rate for a loan.

15. Invoking its improper rulemaking, the OCC attempted to halt the OAG's investigation by filing the instant action, which seeks to enjoin the OAG from "demanding, examining or inspecting the books and records" of national banks and their operating subsidiaries, and from "instituting any enforcement activities," except as authorized by federal law.

16. The OCC's interference with the Attorney General's investigation has impeded his ability to enforce the rights of New York citizens to be free from lending discrimination.

17. There exists a real and actual controversy between the parties that is within the jurisdiction of this Court, the Attorney General is an interested party in the controversy, and the controversy may be determined by a declaration of the rights and other legal relations of the parties.

18. The OCC does not have the authority to promulgate rules that strip states of their statutory and common law authority to investigate and bring judicial actions to enforce non-preempted state laws. To the extent that it seeks to do so, the OCC's rulemaking is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, as well as in excess of the OCC's statutory jurisdiction, authority, and limitations.

19. The OCC's rulemaking is unlawful, and must be set aside under 5 U.S.C. §§ 7.06(2)(a) & (c).

PRAYER FOR RELIEF

WHEREFORE, the Attorney General respectfully requests the Court to enter a judgment and order:

(a) dismissing the complaint with prejudice and awarding costs and disbursements in connection with the defense of this suit;

(b) declaring, pursuant to 28 U.S.C. §§ 2201 and 2202, that Section 484 of the National Bank Act does not divest the Attorney General of his statutory and common law authority to enforce non-preempted state laws against national banks and their operating subsidiaries;

(c) declaring, pursuant to 28 U.S.C. §§ 2201 and 2202, that 12 C.F.R. § 7.4000 is unlawful to the extent that it purports to divest the Attorney General of his statutory and common law authority to enforce non-preempted state laws against national banks and their operating subsidiaries;

(d) setting aside, pursuant to 5 U.S.C. § 706(2)(a) & (b), 12 C.F.R. § 7.4000 to the extent that it purports to prohibit states from exercising their statutory and common law authority to enforce non-preempted state laws against national banks and their operating subsidiaries; and

(e) awarding such other and further relief as this Court may deem appropriate and equitable, including injunctive and declaratory relief as may be required by the interests of justice.

Dated: New York, New York
August 5, 2005

ELIOT SPITZER
Attorney General of the State
of New York
120 Broadway
New York, New York 10271
(212) 416-8041 (212) 416-8074

/s/ Dennis D. Parker

Dietrich L. Snell (DS-9692)
Deputy Attorney General
Thomas G. Conway (TC-9490)
Bureau Chief, Consumer Frauds
and Protection
Dennis D. Parker (DP-1531)
Bureau Chief, Civil Rights

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)
05 Civ. 5636 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C,

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF THOMAS G. CONWAY

Thomas G. Conway, pursuant to 28 U.S.C. § 1746, declares the following:

1. I am the Attorney General In Charge of the Consumer Frauds and Protection Bureau of the Office of the New York State Attorney General ("OAG").

2. The Consumer Frauds and Protection Bureau ("the Bureau") is authorized to prosecute businesses and individuals engaged in fraudulent, misleading, deceptive, or illegal trade practices. Pursuant to that

authorization, the Bureau has developed a long history of aggressive enforcement of state and federal consumer protection laws.

3. Every year the Bureau receives thousands of complaints from individual consumers, including numerous complaints against lenders. Since 2003, the Bureau has received nearly 9,000 complaints against lenders, their subsidiaries and affiliates.

4. In response to these complaints, the Bureau has undertaken numerous investigations into alleged fraud and illegality by lenders, including both state-chartered and nationally-chartered banks. In the course of these investigations, Bureau attorneys review documentary evidence provided by the complainants, the lenders, and third parties. Additionally, Section 63(12) of the Executive Law authorizes the Bureau to issue non-judicial subpoenas requiring the production of documents and testimony. Pursuant to this authority, the Bureau routinely subpoenas individuals and/or companies, requiring them to produce information that is relevant to our investigations, and to testify under oath at subpoena hearings.

5. Over the past several decades, the Bureau has conducted numerous investigations into allegations of fraud and illegality on the part of state and national banks. Where the investigations uncovered evidence of illegal conduct, the Bureau has filed legal actions and obtained consent judgments enjoining the lenders from engaging in prohibited practices. Alternately, the

Bureau has exercised its authority pursuant to Section 63(15) of the Executive Law § 63(15), which permits the Attorney General to obtain an Assurance of Discontinuance in lieu of commencing litigation.

6. Since 1976, the Office of the Attorney General has entered into consent orders and assurances of discontinuance with national banks on at least fourteen occasions, including the following:

a. In 1976, the OAG obtained a Consent Order against Chase Manhattan Bank, N.A. enjoining the bank from collecting attorney's fees in violation of the New York State Judiciary Law;

b. In 1976, the OAG obtained an Assurance of Discontinuance against Citibank, N.A. for failing to clearly and conspicuously disclose account service charges imposed on consumers when legal process is served in connection with a judgment or tax lien or other legal mandate;

c. In 1976, the OAG obtained an Assurance of Discontinuance against Chase Manhattan Bank, N.A. for engaging in improper debt collection practices (contacting third parties without the cardholder's consent);

d. In 1976, the OAG obtained a Consent Judgment against First National City Bank for

obtaining and enforcing default judgments containing attorney's fees in violation of New York law;

e. In 1981, the OAG entered into a Settlement Agreement with Citibank, N.A. following the filing of a lawsuit that challenged Citibank's failure to reimburse consumers for unauthorized withdrawals at Citibank ATM machines;

f. In 1982, the OAG obtained an Assurance of Discontinuance against Citibank (New York State), N.A. for failing to properly acknowledge or investigate complaints of billing errors on its Mastercard and VISA accounts in violation of the Fair Credit Billing Act;

g. In 1990, the OAG obtained an Assurance of Discontinuance against Chase Manhattan Bank, N.A. for deceptively advertising its "Jumbo" mortgage loans;

h. In 2000, the OAG obtained an Assurance of Discontinuance limiting the ability of Chase Manhattan Bank USA, N.A. to share personal customer account and credit information with non-affiliated third party marketers;

i. In 2000 the OAG obtained a Consent Judgment as part of 38-state agreement with

U.S. Bank National Association N.D. regarding the sharing of personal data with unaffiliated third parties;

j. In 2002, the OAG obtained a 28-state Assurance of Discontinuance requiring First USA Bank, N.A., the largest issuer of Visa credit cards, to implement broad reforms in its relationships with third-party vendors to ensure that non-deceptive marketing campaigns are used in soliciting the bank's credit card holders;

k. In 2002, the OAG obtained a 27 state Assurance of Discontinuance requiring Citibank (South Dakota), N.A. to adopt new consumer protection policies in its contracts with telemarketing firms to ensure that non-deceptive marketing campaigns are used in soliciting the bank's credit card holders;

l. In 2002 and 2003, the OAG obtained Assurances of Discontinuance against Citibank (South Dakota), N.A., US Bank National Association (ND) and First Consumers National Bank requiring those banks to block online gambling transactions with its credit cards.

7. Without exception, the banks named in paragraph 6 cooperated with the OAG's investigations. Additionally, until recently, the OCC never challenged

the Attorney General's right to enforce state or federal laws in this manner.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed: New York, NY
August 3, 2005

/s/ Thomas G. Conway
Thomas G. Conway

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)
05 Civ. 5636 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

OFFICE OF THE COMPTROLLER
OF THE CURRENCY

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF DENNIS D. PARKER IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF AND IN SUPPORT OF COUNTERCLAIM

Dennis D. Parker, pursuant to 28 U.S.C. § 1746, declares the following:

1. I am the Chief of the Civil Rights Bureau ("the CRB") of the Office of the New York State Attorney General ("OAG").

2. The CRB enforces laws prohibiting discrimination on the basis of race, color, national origin, sex, religion, age, marital status, sexual orientation or disability. Using federal and state civil rights laws, the Bureau investigates and litigates in state and federal courts complaints alleging a pattern and practice or policy of unlawful discrimination in employment, housing, credit, education and places of public accommodation.

3. Beginning in 2005, Regulation C, promulgated under the Home Mortgage Disclosure Act ("HMDA"), required that lenders publicly disclose information about the costs of their higher priced loans. Specifically, lenders were required to disclose information about each loan where the annual percentage rate ("APR") exceeded a certain rate. This information, coupled with lenders' ongoing disclosures about the race, ethnicity, sex and income of borrowers, allows the public to analyze whether there exist racial disparities in the interest rates charged on higher priced loans.

4. In April 2005, the CRB conducted an analysis of publicly available HMDA data. The analysis revealed significant racial disparities in interest rates for loans secured by property in the state of New York. For example, our analysis found that African-American customers of Wells Fargo were 3 times more likely to receive higher cost loans than were white customers; African-American customers of J.P. Morgan Chase and Citigroup were twice as likely as whites to receive higher cost loans; while African-Americans borrowing from HSBC were 1.5 times as likely as whites to receive higher cost loans. Annexed hereto as Exhibit 1 is a true and correct copy of the CRB's "HMDA Data Analysis Chart" setting forth the results of the review.

5. These data were sufficient to establish a *prima facie* case of discrimination on the basis of race under both federal and state fair lending laws. However, in statements made to the OAG and publicly, bank representatives claimed that the HMDA data did not contain information sufficient to fully explain the disparities reported. Accordingly, the CRB sought additional information to assist in evaluating whether the racial disparities were the result of illegal racial discrimination.

6. Toward that end, the CRB commenced a preliminary inquiry into the lending practices of a number of banks whose HMDA data revealed racial disparities. In furtherance of that inquiry, in April 2005, the OAG sent letters to a number of banks advising them that the racial disparities in loan rates identified by our

analysis might indicate a violation of state and federal laws prohibiting discrimination in lending, and requesting that the banks voluntarily provide the OAG with information concerning the factors and policies used in determining loan rates.

7. The OAG sent letters to a number of national bank members of the Clearinghouse Association, including Citigroup, Wells Fargo, HSBC , and JP Morgan Chase. Annexed hereto as Exhibit 2 are true and correct copies of those letters.

8. In the weeks following the requests, I spoke with counsel for each of the banks, most of whom indicated a willingness to provide information voluntarily to the OAG. Some of the banks requested that the OAG enter into confidentiality agreements to limit the potential disclosure of proprietary or private information. The OAG agreed to these requests and began discussions of the content of those agreements. A confidentiality agreement with HSBC was executed on June 13, 2005.

9. In July 2005, I, with the assistance of CRB staff acting under my direct supervision, conducted an informal survey of certain state and local agencies certified to participate in the Fair Housing Assistance Program ("FHAP") of the Department of Housing and Urban Development ("HUD") to determine whether those agencies have ever received and investigated complaints of discrimination in lending against national banks or their operating subsidiaries. I identified FHAP

agencies by consulting HUD's website at *http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm.*

10. On or around July 1, 2005, I contacted the New York State Division of Human Rights ("SDHR") to inquire whether SDHR had ever received and investigated complaints of discrimination in lending against national banks.

11. In response to my request, SDHR produced documents reflecting that SDHR has received complaints concerning discrimination in lending against lending institutions, including national banks. A true and correct copy of the SDHR complaints filed against Charter One Bank, N.A. and Bank of America are annexed hereto as Exhibit 3.

12. On or around July 15, 2005, and on a number of days subsequent, the CRB contacted the North Carolina Human Relations Commission ("NCHRC") to inquire whether NCHRC had ever received and investigated complaints of discrimination in lending against national banks.

13. In response to our inquiry, NCHRC produced documents reflecting that NCHRC has received and investigated many complaints against banks, including nationally chartered banks and their operating subsidiaries. Declaration of George I. Allison, dated August 5, 2005 ("Allison Decl."), ¶ 5, annexed hereto as Exhibit 4. In particular, NCHRC had received and investigated complaints against National City Bank and First Tennessee Bank, N.A. Allison Decl. ¶ 5.

14. During the week of July 11, 2005, and on dates subsequent, the CRB contacted the Illinois Department of Human Rights ("IDHR") to inquire whether IDHR had ever received and investigated complaints of discrimination in lending against national banks or their operating subsidiaries.

15. In response to our inquiry, we received a letter from Raymundo R. Luna, Chief Legal Counsel for the IDHR, dated July 19, 2005, annexed hereto as Exhibit 5. This letter and its attachment indicate that IDHR had received at least 5 fair lending complaints against national banks, 4 of which had been referred to IDHR from HUD.

16. During the week of July 18, 2005, the CRB contacted the Pennsylvania Human Relations Commission ("PHRC") to inquire whether PHRC had ever received and investigated complaints of discrimination in lending against national banks or their subsidiaries.

17. In response to our inquiry, PHRC produced documents reflecting that PHRC has received and investigated at least sixty-eight complaints of discrimination in lending against banks, including nationally chartered banks and their operating subsidiaries. Declaration of Homer C. Floyd, dated August 3, 2005, ¶ 5, annexed hereto as Exhibit 6. Some of those complaints were filed with PHRC directly, while some of the complaints against national banks were filed with HUD, and then referred by HUD to PHRC. Floyd

Decl. ¶ 6. In response to those complaints, PHRC has conducted thorough investigations and the subject banks and their subsidiaries have complied with those investigations. Floyd Decl. ¶ 8. To the best of the knowledge, information and belief of the Executive Director of the PHRC, the Office of the Comptroller of the Currency has never contacted PHRC to object to the agency's investigation of a complaint of discrimination in lending filed against a national bank. Floyd Decl. ¶ 9.

18. During the week of August 1, 2005, the CRB contacted the Civil Rights Division of the Office of the Attorney General of the State of Arizona to inquire whether the Arizona Attorney General's office, which is a certified FHAP agency, had ever received and investigated complaints of discrimination in lending against national banks or their subsidiaries.

19. In response to our inquiry, I received a letter from Melanie V. Pate, Chief Counsel, dated August 4, 2005, annexed hereto as Exhibit 7. This letter indicates that since 1993, the Arizona Attorney General's office has received and investigated 10 complaints of discrimination in lending against national banks. These complaints were either cross-filed with or referrals from HUD.

20. Annexed hereto as Exhibit 8 is a true and correct copy of the Letter from Dietrich L. Snell, Deputy Attorney General, to The Honorable Sidney H. Stein, dated June 20, 2005.

21. Annexed hereto as Exhibit 9 is a true and correct copy of the Letter from Dietrich L. Snell, Deputy Attorney General, to The Honorable Sidney H. Stein, dated June 21, 2005.

22. Annexed hereto as Exhibit 10 is a true and correct copy of OCC Interpretive Letter No. 998 (August 2004).

23. Annexed hereto as Exhibit 11 is a true and correct copy of the relevant portions of Comptroller of the Currency, *Annual Report: Fiscal Year 2004* (October 2004) (available at *http://www.occ.treas.gov/annrpt/2004AnnualReport.pdf).*

24. Annexed hereto as Exhibit 12 is a true and correct copy of 2004 Att'y Gen. Ann. Rep. Pursuant to Equal Credit Opportunity Act, available at *www.usdoj.gov.crt.housing/documents/ecoa2004.htm.*

25. Annexed hereto as Exhibit 13 is a true and correct copy of 2003 Att'y Gen. Ann. Rep. Pursuant to Equal Credit Opportunity Act, available at *www.usdoj.gov.crt.housing/documents/ecoa2003.htm.*

26. Annexed hereto as Exhibit 14 is a true and correct copy of 2002 Att'y Gen. Rep. Pursuant to Equal Credit Opportunity Act, available at *www.usdoj.gov.crt.housing/documents/ecoa2002.htm.*

27. Annexed hereto as Exhibit 15 is a true and correct copy of 2001 Att'y Gen. Rep. Pursuant to Equal Credit Opportunity Act, available at *www.usdoj.gov.crt.housing/documents/ecoa2001.htm.*

28. Annexed hereto as Exhibit 16 is a true and correct copy of 2000 Att'y Gen. Rep. Pursuant to Equal Credit Opportunity Act, available at *www.usdoj.gov.crt.housing/documents/ecoa2000.htm;*

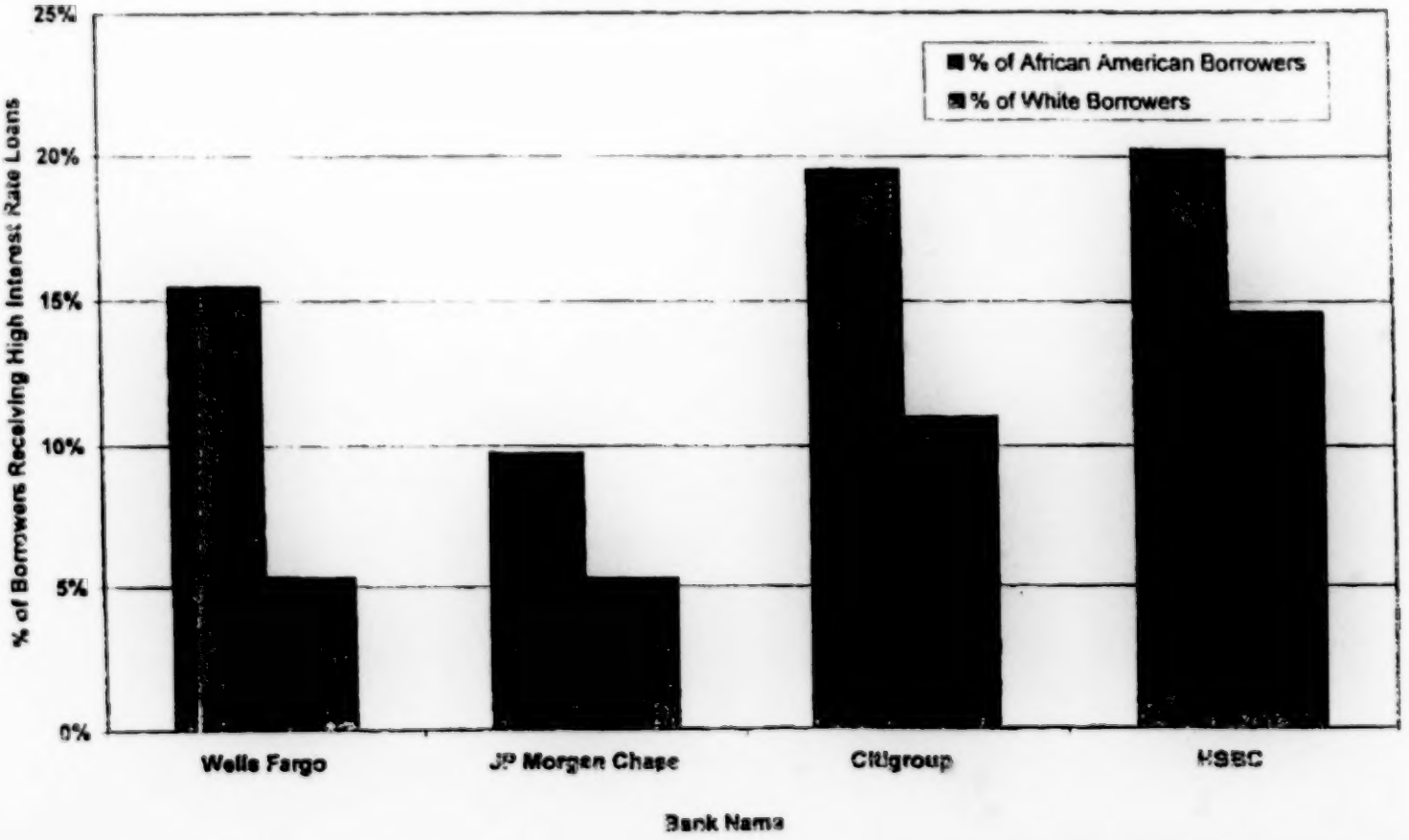
29. Annexed hereto as Exhibit 17 is a true and correct copy of 1999 Att'y Gen. Rep. Pursuant to Equal Credit Opportunity Act, available at *www.usdoj.gov.crt.housing/documents/ecoa1999.htm.*

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed: New York, NY
August 5, 2005

/s/ Dennis D. Parker
Dennis D. Parker

High Interest Rate Loans Originated in New York State by Race of Borrower



source: 2004 HMDA Loan Application Registers of the above listed banks

EXHIBIT 2

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Civil Rights Bureau

April 6, 2005

BY FAX AND MAIL

Eric V. Eve
Executive Director
Community Relations
Global Consumer Group
Citigroup, Inc.
399 Park Avenue
New York, NY 10022

Re: 2004 HMDA Data

Dear Eric:

Thank you once again for coming to our offices and making a very informative presentation concerning your 2004 HMDA data. We found the discussion quite useful.

As we discussed, we write to request information to clarify some of the issues raised during your

presentation. Please provide the following data and information for calendar year 2004:

1) All data contained in the HMDA Loan/ Application Register for loans or applications related to property located in the State of New York. Please provide this data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM. Please provide data for CitiMortgage, CitiFinancial, Citicorp Trust Bank, CitiFinancial Mortgage Company, and any other Citigroup subsidiary or unit.

2) The data dictionary for the Loan/Application Register, and any other information or instructions necessary to analyze and decipher any coding or information contained in the Register.

3) A list and explanation of all variables that determined the APR for a HMDA reportable loan (*i.e.*, credit score, loan-to-value ratio, etc.), and any general formulas that were used to calculate such rates.

4) A list and explanation of all variables and data fields included in any database that contains aggregate information concerning HMDA reportable loans, including variables and data fields not necessarily required by HMDA (*i.e.*, term of loan, office that received application, etc.).

5) All documents relating to internal audits or analyses conducted by Citigroup to assess, analyze, or evaluate any racial or ethnic disparities in its 2004 HMDA data.

6) A list of all HMDA reportable loan products, and an explanation of the features of each product.

7) All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by the automated risk-based pricing process described at our meeting, and all policies and procedures concerning approval and monitoring of the origination of such higher cost loans.

8) A list of the addresses of all Citigroup and Citigroup subsidiary locations that provide HMDA reportable loans in the State of New York.

Please provide us with responsive data and information by April 20, 2005. We will then let you know whether we need any further information to conduct additional analyses. Once again, we appreciate your cooperation and willingness to take the initiative to reach out to us about this matter. If you have any questions, please contact me at (212) 416-6396.

Sincerely yours,

/s/ Jeffrey K. Powell
Jeffrey K. Powell
Assistant Attorney General

cc: Martin Wong, Esq.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Civil Rights Bureau

April 19, 2005

BY OVERNIGHT MAIL

Richard M. Kovacevich
President and CEO
Wells Fargo & Company
P.O. Box 6995
Portland, OR 97228

James M. Strother
Executive Vice President and General Counsel
Wells Fargo & Company
633 Folson Street, 7th Floor
San Francisco, CA 94107-3600

Re: 2004 HMDA Data

Dear Mr. Kovacevich and

Mr. Strother:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year 2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing Wells Fargo's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that Wells Fargo voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for calendar year 2004. Please provide data for Wells Fargo as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate

business considerations, we ask that you provide the following material:

a) A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions (*e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to Wells Fargo's 2004 HMDA reportable loans and applications conducted either by or on behalf of Wells Fargo.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by

application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,
/s/
Dennis D. Parker
Bureau Chief

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Civil Rights Bureau

April 19, 2005

BY OVERNIGHT MAIL

Martin J.G. Glynn
President and CEO
HSBC Bank USA, N.A.
452 Fifth Avenue, 10th Floor
New York, NY 10018

Janet L. Burak
General Counsel
HSBC Bank USA, N.A.
452 Fifth Avenue, 7th Floor
New York, NY 10018

Re: 2004 HMDA Data

Dear Mr. Glynn and Ms. Burak:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year 2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and

reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing HSBC's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that HSBC voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for calendar year 2004. Please provide data for HSBC as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate business considerations, we ask that you provide the following material:

a) A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions *(e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to HSBC's 2004 HMDA reportable loans and applications conducted either by or on behalf of HSBC.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered to

a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,

/s/
Dennis D. Parker
Bureau Chief

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ELIOT SPITZER
Attorney General

DIVISION OF PUBLIC ADVOCACY
Civil Rights Bureau

April 20, 2005

BY OVERNIGHT MAIL

Joan Guggenheimer
General Counsel
JP Morgan Chase & Co.
270 Park Avenue
New York, NY 10017-2070

Re: 2004 HMDA Data

Dear Ms. Guggenheimer:

We understand that the loan data required to be reported pursuant to the Home Mortgage Disclosure Act ("HMDA") are currently available for calendar year 2004. Recent revisions to Federal Reserve Board Regulation C require additional data to be collected and reported, including the annual percentage rate ("APR") and rate spread for certain higher-cost loans.

Published reports analyzing JP Morgan Chase's 2004 HMDA data suggest that African-American and Hispanic borrowers are substantially more likely than white borrowers to receive higher-cost loans from your

institution. These racial and ethnic disparities are troubling on their face, and unless legally justified may violate federal and state anti-discrimination laws such as the Equal Credit Opportunity Act and its state counterpart, New York State Executive Law § 296-a.

We have commenced a preliminary inquiry into this matter to determine the causes of these disparities. In lieu of issuing a formal subpoena, we write to request that JP Morgan Chase voluntarily provide our office with certain information regarding its HMDA reportable loans and applications.

First, we ask that you produce all data contained in the HMDA Loan/Application Register ("LAR") for loans or applications related to property located in the State of New York for calendar year 2004. Please provide data for JP Morgan Chase as well as all of its subsidiaries and units; submit these data in an electronic, computer-readable format, preferably on an ASCII diskette or CD/ROM; and include the data dictionary for the LAR, as well as any other information or instructions necessary to analyze and decipher any coding or information contained in the LAR.

Second, in order to determine whether any disparities in loan pricing are justified by legitimate business considerations, we ask that you provide the following material:

a) A list and explanation of all variables that determined the APRs for 2004 HMDA

reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates.

b) An extract of every computer database containing basic loan conditions *(e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans. Please provide the extract(s) in an electronic, computer readable format, on an ASCII diskette or CD/ROM.

c) All documents reflecting any analysis or examination of racial or ethnic disparities with respect to JP Morgan Chase's 2004 HMDA reportable loans and applications conducted either by or on behalf of JP Morgan Chase.

d) A list of all HMDA reportable loan products, and an explanation of the features of each product.

e) All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans.

Please provide us with responsive data and information by May 3, 2005. We will then let you know whether we need any further information to conduct our analysis. If you have any questions, please contact me at (212) 416-8240.

Sincerely yours,

/s/ Dennis D. Parker
Dennis D. Parker
Bureau Chief

EXHIBIT 3

STATE OF NEW YORK: EXECUTIVE DEPARTMENT STATE DIVISION OF HUMAN RIGHTS

EXEC. LAW ART. 15
SDHR NO:
9H-H-NS- -1000099-H

(State Division of Human Rights on the Complaint of)

Hada I Lugo de Slosser

COMPLAINANT

- against -

Charter One Bank, N.A.

RESPONDENT

I, Hada I Lugo de Slosser, residing at 111 Waverly Place, New York, NY 10011, Tel. No. (212) 475-3386, (718) - charge the above-named respondent whose address is 6 Oak Street Plattsburgh, NY 12901 with an unlawful discriminatory practice relating to Housing in violation of Article 15 of the Executive Law of the State of New York (Human Rights Law) because of National Origin and Sex.

Date most recent or continuing discrimination took place.

The particulars are:

See attached HUD 903 form.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT STATE DIVISION OF HUMAN RIGHTS

EXEC. LAW ART. 15
SDHR NO:
1D-H-R-02-5806181-H

(State Division of Human Rights on the Complaint of)

Darrick Grimes

COMPLAINANT

- against -

Bank of America / Equicredit Corp.

RESPONDENT

I, Darrick Grimes, residing at 188-19 104th Avenue, St. Albans, NY 11412, Tel. No. (718) 464-3331H, (718) 464-3331 charge the above-named respondent whose address is 100 North Tryon Street Charlotte, NC 28255 with an unlawful discriminatory practice relating to Housing in violation of Article 15 of the Executive Law of the State of New York (Human Rights Law) because of Race, Color.

Date most recent or continuing discrimination took place 08/20/02.

The particulars are:

SEE ATTACHED

EXHIBIT 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)
05 Civ. 5636 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

OFFICE OF THE COMPTROLLER
OF THE CURRENCY

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF GEORGE I. ALLISON IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

George I. Allison, pursuant to 28 U.S.C. § 1746, declares the following:

1. I am the Executive Director of the North Carolina Human Relations Commission (NCHRC).

2. NCHRC is the state agency charged with enforcement of the State Fair Housing Act (Chapter 41A). NCHRC receives, investigates, and adjudicates complaints from North Carolina citizens concerning discrimination in housing.

3. NCHRC is also certified to participate in the Fair Housing Assistance Program (FHAP) of the Department of Housing and Urban Development (HUD). In order to be certified as a FHAP agency, HUD must determine that the agency enforces a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act (FHA). NCHRC became a certified FHAP agency in 1987, after HUD concluded that the North Carolina Fair Housing Act is substantially similar, both substantively and procedurally, to the FHA.

4. With respect to consumer complaints concerning housing and/or lending discrimination, North Carolina

citizens can file complaints directly with NCHRC, or can file their complaints directly with HUD. When HUD receives a complaint alleging housing discrimination in North Carolina, HUD refers the complaint to NCHRC for investigation, conciliation and enforcement activities.

5. Over the past ten years, NCHRC has received numerous complaints against lending institutions concerning discrimination in lending, including complaints against national banks and their operating subsidiaries. For example, NCHRC has received and investigated complaints against National City Bank and First Tennessee Bank, N.A.

6. Some of these complaints have been filed with NCHRC directly. In some instances, complaints against national banks or their operating subsidiaries have been filed with HUD, and HUD has referred those complaints to NCHRC for investigation, conciliation and enforcement activities.

7. When NCHRC receives a complaint, whether that complaint is filed directly with the agency or referred by HUD, NCHRC conducts a thorough investigation, which typically involves the review of documentary evidence provided by both the complainant and the entity against whom the complaint is filed. NCHRC has statutory authority to issue non judicial. subpoenas to require the production of evidence, and routinely exercises this authority as necessary when investigating complaints.

8. Where NCHRC has received complaints against national banks or their subsidiaries, NCHRC has conducted thorough investigations into the complaints and the banks and their subsidiaries have complied with those investigations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed: Raleigh, North Carolina
August 5, 2005

/s/ George I. Allison
GEORGE I. ALLISON

EXHIBIT 5

ILLINOIS DEPARTMENT OF
Human Rights
COMMEMORATING 25 YEARS OF SERVICE
ROD BLAGOJEVICH, GOVERNOR
ROCCO CLAPS, DIRECTOR

July 19, 2005

Ann Pearson
Assistant Attorney General
New York State Attorney General's Office
Civil Rights Division
120 Broadway
New York, NY 10271

Re: IDHR housing charges of discrimination against Banking Institutions

Dear Ms. Pearson:

Pursuant to your request, attached as Exhibit A, please find a list of housing discrimination charges investigated by the Illinois Department of Human Rights ("IDHR") since the fiscal year 2003 against banking institutions. This list includes charges of discrimination filed with the U.S. Department of Housing and Urban Development ("HUD") and referred to the Department for investigation and charges filed with IDHR and cross-filed with HUD in accordance with our worksharing agreement with HUD.

If you have any questions or need any additional information, please do not hesitate to contact our office.

Very truly yours,

/s/ Raymundo R. Luna
Raymundo R. Luna
Chief Legal Counsel

193a.

Bank	IDHR No.	HUD No.	Filed	Closed	Origin	Nature of alleged discrimination	FHA Section	IHRA Section
Royal Savings Bank	2003CH3062	050305168	03/28/03	08/18/03	HUD	Failure to refinance b/c race	Section 805	Section 3-102(a)
Northern Trust Bank	2004CH0076	050308638	07/10/03	12/10/03	IDHR	Discriminatory terms in financing b/c race	Section 805	Section 3-102(b)
ShoreBank	2004CH0673	050311038	09/08/03	12/01/03	IDHR	Discriminatory terms in financing b/c race	Section 805	Section 3-102(b)
U.S. Bank	2004CH0960	050312068	09/30/03	03/24/05	HUD	Refusal to finance b/c sex	Section 805	Section 3-102(a)
Harris Trust & Savings Bank	2004CH1313	050301088	10/15/03	06/30/04	HUD	Refusal to finance b/c race and sex	Section 805	Section 3-102(a)
Northern Trust Bank	2005CH0047	050409528	07/07/04	06/07/05	HUD	Failure to refinance b/c race	Section 805	Section 3-102(a)
Chase Bank	2005CH3230	050507838	04/20/05	Pending	HUD	Refusal to finance b/c race	Section 805	Section 3-102(a)
National City Bank	2005CH3230	050507838	04/20/05	Pending	HUD	Refusal to finance b/c race	Section 805	Section 3-102(a)
Washington Mutual	2005CH3914	050512058	06/29/05	Pending	IDHR	Failure to refinance b/c race	Section 805	Section 3-102(a)

EXHIBIT

EXHIBIT 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5629 (SHS)
05 Civ. 5636 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

OFFICE OF THE COMPTROLLER
OF THE CURRENCY

Plaintiff,

- against -

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

DECLARATION OF HOMER C. FLOYD IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

Homer C. Floyd, pursuant to 28 U.S.C. §1746, declares the following:

1. I am the Executive Director of the Pennsylvania Human Relations Commission ("PHRC").

2. PHRC is the state agency charged with enforcement of the Pennsylvania Human Relations Act. PHRC receives, investigates, and adjudicates complaints from Pennsylvania citizens concerning discrimination in housing and lending.

3. PHRC is also certified to participate in the Fair Housing Assistance Program ("FHAP") of the Department of Housing and Urban Development ("HUD"). In order to be certified as a FHAP agency, HUD must determine that the agency enforces a law that provides substantive rights, procedures, remedies and judicial review provisions that are substantially equivalent to the federal Fair Housing Act ("FHA"). PHRC became a certified FHAP agency in 1982, after HUD concluded that the Pennsylvania Human Relations Act is substantially similar, both substantively and procedurally, to the FHA.

4. With respect to consumer complaints concerning housing and/or lending discrimination, Pennsylvania

citizens can file complaints directly with PHRC, or can file their complaints directly with HUD. When HUD receives a complaint alleging housing discrimination in Pennsylvania, HUD refers the complaint to PHRC for investigation, conciliation and enforcement activities.

5. Over the past seventeen years, PHRC has received at least sixty-eight complaints against lending institutions concerning discrimination in lending, including complaints against national banks and their operating subsidiaries.

6. Some of these complaints have been filed with PHRC directly. When complaints are filed directly with PHRC, the agency cross-files the complaints with HUD, so that HUD is aware that the agency has received a complaint against a national bank and intends to investigate that complaint. In some instances, complaints against national banks or their operating subsidiaries have been filed with HUD, and HUD has referred those complaints to PHRC for investigation, conciliation and enforcement activities.

7. When PHRC receives a complaint, whether that complaint is filed directly with the agency or referred by HUD, PHRC conducts a thorough investigation, which typically involves the review of documentary evidence provided by both the complainant and the entity against whom the complaint is filed. PHRC has the authority to issue non-judicial subpoenas to require the production of evidence, and exercises this authority when investigating complaints.

8. Where PHRC has received complaints against national banks or their subsidiaries, PHRC has conducted thorough investigations into the complaints and the banks and their subsidiaries have complied with those investigations.

9. To the best of my knowledge, information and belief, the Office of the Comptroller of the Currency has never contacted PHRC to object to the agency's investigation of a complaint of discrimination in lending filed against a national bank.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed: Harrisburg, Pennsylvania
August 3, 2005

/s/ Homer C. Floyd
HOMER C. FLOYD

EXHIBIT 7

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

Terry Goddard
Attorney General

August 4, 2005

VIA FACSIMILE AND FEDERAL EXPRESS

Dennis Parker
Bureau Chief, Civil Rights Bureau
New York Attorney General's Office
120 Broadway, 3rd Floor
New York, New York 10271

Re: Request for Information

Dear Mr. Parker:

At your request, the Civil Rights Division of the Arizona Attorney General's Office searched its records for discriminatory lending complaints that have been brought against national banks under the Fair Housing Act and investigated by the Division. The Division has investigated ten (10) complaints of this type since 1993.

These cases were either cross-filed with or referrals from the Department of Housing and Urban Development. Please let me know if you require any additional information.

Sincerely,

/s/ Melanie V. Pate
Melanie V. Pate
Chief Counsel
Compliance Section

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

05 Civ. 5636 (SHS)

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff,

v.

ELIOT SPITZER, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Defendant.

REPLY TO DEFENDANT'S COUNTERCLAIM BY PLAINTIFF OFFICE OF THE COMPTROLLER OF THE CURRENCY

Pursuant to the requirements of Federal Rule of Civil Procedure 12(a)(3)(A), Plaintiff Office of the Comptroller of the Currency ("OCC") hereby submits its Reply to Defendant's Counterclaim. The OCC believes that, apart from the requested relief, the Counterclaim raises no material issues distinct from those already fully briefed by the parties in the context of the OCC's complaint and motion seeking equitable and declaratory relief.

Accordingly, the OCC responds to the assertions in the Defendant's Counterclaim as follows.

1. The allegations in paragraph 1 of the Counterclaim are conclusions of law as to which no answer is required.

2. The allegations in paragraph 2 of the Counterclaim are conclusions of law as to which no answer is required; to the extent they may be deemed allegations of fact, they are denied except to the extent supported by the statutes cited, which are the best evidence of their contents.

3. The allegations in paragraph 3 of the Counterclaim are conclusions of law as to which no answer is required.

4. The allegations in the first three sentences of paragraph 4 of the Counterclaim are conclusions of law as to which no answer is required; the OCC denies the allegations in the fourth sentence of paragraph 4.

5. The allegations in paragraph 5 of the Counterclaim are conclusions of law as to which no answer is required; to the extent the allegations may be deemed allegations of fact, admit that the OCC promulgated regulations accompanied by preambles in 1999 and 2004, which are the best evidence of their contents; deny the remaining allegations in paragraph 5.

6. The allegations in paragraph 6 of the Counterclaim are conclusions of law as to which no answer is required; to the extent they may be deemed allegations of fact, admit that the OCC promulgated a regulation accompanied by a preamble in 2004, which is the best evidence of its contents; deny the remaining allegations in paragraph 6.

7. The allegations in paragraph 7 of the Counterclaim are conclusions of law as to which no answer is required; to the extent they may be deemed allegations of fact, admit that the OCC promulgated a regulation accompanied by a preamble in 2004, which is the best evidence of its contents; deny the remaining allegations in paragraph 7.

8. The OCC denies the allegations in paragraph 8 of the Counterclaim.

9. The allegations in paragraph 9 of the Counterclaim are conclusions of law as to which no answer is required; to the extent they may be deemed allegations of fact, admit that the OCC received comments opposing the proposed regulation; admit that the OCC promulgated a final rule accompanied by a preamble in 2004, which is the best evidence of its contents; deny the remaining allegations in paragraph 9.

10. The first sentence of paragraph 10 of the Counterclaim is a conclusion of law as to which no answer is required; the OCC is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 10.

11. The OCC is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11 of the Counterclaim.

12. The OCC is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 of the Counterclaim.

13. The allegations of paragraph 13 of the Counterclaim are conclusions of law to which no answer is required.

14. Admit that the Office of Attorney General sent letters to the named banks, which letters are the best evidence of their contents; the OCC is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 14 of the Counterclaim.

15. With respect to the allegations in paragraph 15 of the Counterclaim, the complaint in this case is the best evidence of its contents; deny the remainder of the allegations in paragraph 15.

16. The allegations of paragraph 16 of the Counterclaim are conclusions of law as to which no answer is required; to the extent that the allegations may be deemed to be allegations of fact, they are denied.

17. The allegations of paragraph 17 of the Counterclaim are conclusions of law as to which no answer is required.

18. The allegations of paragraph 18 of the Counterclaim are conclusions of law as to which no answer is required.

19. The allegations of paragraph 19 of the Counterclaim are conclusions of law as to which no answer is required.

20. The OCC denies each and every allegation of the Counterclaim not previously admitted or otherwise qualified.

21. The remainder of Defendant's Counterclaim consists of Defendant's prayer for relief as to which no answer is required, but insofar as an answer may be deemed required, it is denied.

FIRST AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

Wherefore, Plaintiff OCC denies that the Defendant Elliot Spitzer, Attorney General of the State of New York is entitled to any relief from the Court and requests that the Court dismiss the Defendant's counterclaim against the OCC with prejudice and grant the OCC the declaratory and injunctive relief requested in its complaint.

Respectfully submitted,

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OCTOBER 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ. 5629 (SHS)

THE CLEARING HOUSE ASSOCIATION, L.L.C.,

Plaintiff,

v.

ELIOT SPITZER, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Defendant.

JUDGMENT AND DECREE

FOR THE REASONS STATED in the Court's Opinion and Order dated October 12, 2005, it is hereby

ORDERED, ADJUDGED, and DECREED that the Attorney General of the State of New York, and all those acting under his direction or in concert with him, are permanently enjoined from:

1. Issuing subpoenas for or demanding inspection of the books and records of any of the national bank members of The Clearing House Association, L.L.C. or their operating subsidiaries in connection with the Attorney General's investigation into residential lending practices;

2. Instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands;

3. Instituting actions in the courts of justice against those national banks or their operating subsidiaries to enforce state fair lending laws; and

4. Instituting any judicial action premised on the state's *parens patriae* authority to enforce the Fair Housing Act's fair lending provisions against the national bank members of The Clearing House Association, L.L.C. or their operating subsidiaries.

Dated: New York, New York
November 4, 2005

/s/ Sidney H. Stein
USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 05 Civ 5636 (SHS)

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Plaintiff,

- v. -

ELIOT SPITZER, in his official capacity as
Attorney General for the State of New York

Defendant.

JUDGMENT AND DECREE

FOR THE REASONS STATED in the Court's Opinion and Order dated October 12, 2005, it is hereby,

ORDERED, ADJUDGED and DECLARED that:

(1) The Attorney General of the State of New York cannot enforce state fair lending laws against national banks or their operating subsidiaries;

(2) The Attorney General cannot compel compliance with a state investigation into potential violations in connection with the residential mortgage lending practices of those banks except as authorized by federal law; and

(3) The courts of justice exception to section 484 does not provide an exception permitting the Attorney General to enforce state or federal fair lending laws through judicial actions; and it is further

ORDERED, ADJUDGED that the Attorney General of the State of New York, and all those acting under his direction or in concert with him, are hereby permanently enjoined from:

(a) Issuing subpoenas for or demanding inspection of the books and records of any of national banks in connection with his investigation into residential lending practices;

(b) Instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and

(c) Instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Dated: New York, New York
November 28, 2005

SO ORDERED:

/s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

SUPREME COURT OF THE UNITED STATES

No. 08-453

Andrew M. Cuomo, Attorney General of New York,

Petitioner

v.

The Clearing House Association, L.L.C., et al.

ON PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit, No. 05-5996, 05-6001.

ON CONSIDERATION of the petition for a writ of certiorari herein to the United States Court of Appeals for the Second Circuit.

IT IS ORDERED by this Court that the said petition is granted. The brief of petitioner is to be filed on or before Wednesday, February 25, 2009. The briefs of respondents are to be filed on or before Wednesday, March 25, 2009. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.

January 16, 2009

PETITIONER'S BRIEF

122

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No. 08-453

Supreme Court, U.S.
FILED
FEB 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

12 U.S.C. § 484(a), a provision of the National Bank Act, prohibits the exercise of "visitorial powers" over national banks except where those powers are authorized by federal law, vested in the courts of justice, or exercised or directed by Congress or a House or committee thereof. The Office of the Comptroller of the Currency has issued a regulation (12 C.F.R. § 7.4000) interpreting § 484(a) to preempt state enforcement of state laws against national banks, even when the state laws are not substantively preempted. The questions presented are:

1. Whether 12 C.F.R. § 7.4000 is invalid because it is inconsistent with the authoritative construction of the National Bank Act by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

2. Whether 12 C.F.R. § 7.4000 is entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 510 F.3d 105. The opinions of the district court (Pet. App. 63a-117a, 118a-142a) are reported at 396 F. Supp. 2d 383 and 394 F. Supp. 2d 620.

JURISDICTION

The court of appeals entered judgment on December 4, 2007. A timely petition for rehearing en banc was denied on June 5, 2008. Pet. App. 143a-144a. On August 26, 2008, Justice Ginsburg granted petitioner an extension of time until October 3, 2008, to file a petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional, statutory, and regulatory provisions are reproduced in the petition appendix: U.S. Const., Art. VI, cl. 2; 12 U.S.C. § 484; and 12 C.F.R. § 7.4000. See Pet. App. 145a-150a. New York Executive Law § 63(12) and New York Executive Law § 296-a are reproduced in an addendum to this brief.

STATEMENT

A. The National Bank Act

1. Congress first authorized the chartering of national banks in 1863 when it enacted the National Currency Act, which was amended and reenacted in 1864,

and subsequently renamed the National Bank Act.[1] The Act's primary purpose was to address pressing wartime federal revenue needs by replacing notes issued by individual state-chartered banks with a new national currency that would be tied to the purchase of federal bonds. Cong. Globe, 37th Cong., 3d Sess. 843 (1863). Congress authorized the Treasury Department to charter private banking associations to issue the new currency. Act of Feb. 25, 1863, National Currency Act, ch. 58, §§ 4-6, 18, 21, 12 Stat. 665-67, 669-70.

The 1863 act prescribed detailed requirements for the organization of these national banks, governing such matters as required capital and reserves, *id.* §§ 6, 7, 13, 38, 41, 42, 12 Stat. at 666-69, 676-77; the number, residency, and election of directors, *id.* §§ 39-40, 12 Stat. at 676; shareholder rights and obligations, *id.* §§ 8, 12, 35, 36, 38, 12 Stat. at 667-68, 675-76; and the authorized powers of national banks, including the power to make contracts, sue and be sued, select directors and officers, discount and negotiate promissory notes and other instruments, receive deposits, and loan money on personal security, *id.* § 11, 12 Stat. at 668.

To promote public trust in the new currency, the act created within the Treasury Department the new Office of the Comptroller of the Currency (OCC), and vested the Comptroller with supervisory authority over

---

1. National Currency Act, ch. 58, 12 Stat. 665 (1863); Act of June 3, 1864, ch. 106, 13 Stat. 99; Act of June 20, 1874, ch. 343, § 1, 18 Stat. 123 (renaming the 1864 act "the national-bank act"). Both the 1863 and 1864 acts are referred to herein as the National Bank Act ("NBA").

national banks to ensure their proper organization and their financial safety and soundness. *Id.* §§ 1, 9, 29, 50, 51, 12 Stat. at 665-68, 673-74, 679-80.

The statute authorized the Comptroller to certify banks to begin operating under federal charters, after examining

> the amount of money paid in on account of its capital stock; the name and place of residence of each of the directors . . . and the amount of the capital stock of which each is the bona fide owner, and generally whether such association has complied with all the requirements of this act to entitle it to engage in the business of banking.

Id. § 9, 12 Stat. at 667-68; *see also id.* § 10, 12 Stat. at 668. The Comptroller was authorized to appoint a receiver to take possession of a bank and administer its assets if the bank refused to redeem its circulating notes, *id.* § 29, 12 Stat. at 673-74, and to sue for forfeiture of a bank's charter if its directors knowingly violated, or knowingly permitted any of the bank's officers, employees, or agents to violate, any of the NBA's provisions, *id.* § 50, 12 Stat. at 679.

Congress authorized the Comptroller to monitor bank affairs on an ongoing basis by means of appointed examiners. *Id.* § 51, 12 Stat. at 679-80. The Comptroller was directed to appoint persons "to make a thorough examination into all the affairs" of national banks and to "make a full and detailed report of the [banks'] condition . . . to the comptroller." *Id.* The same provision

stated that the banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." *Id.*

In 1875, Congress divided that text into two separate sections, which became §§ 5240 and 5241 of the Revised Statutes. The provision describing OCC's own visitorial examination powers was placed in § 5240. Rev. Stat. § 5240, at 1013 (2d ed. 1878). The bar on other exercises of visitorial powers was included in § 5241, rephrased slightly to read: "No association shall be subject to any visitorial powers other than such as are authorized by this Title, or are vested in the courts of justice." *Id.* § 5241, at 1013.

2. With the passage of the Federal Reserve Act of 1913, ch. 6, 38 Stat. 251, Congress transferred control over the nation's currency from the Comptroller to the newly created Federal Reserve Board (later renamed the Board of Governors of the Federal Reserve System). The Comptroller has retained his role as primary administrator of the national banks, although the Board of Governors and the FDIC also possess certain supervisory authority over national banks.[2]

---

2. *See* 12 U.S.C. § 222 (national banks must join the Federal Reserve System) § 483 (special examinations by Federal Reserve Banks), § 485 (examinations by Board of the Federal Reserve), § 501a (Comptroller's authority to sue for charter forfeiture of national bank, under direction of Board of Governors, when banks fail to comply with Federal Reserve Act); § 1820(b)(3) (special examinations by the FDIC).

Today the Comptroller retains supervisory authority to charter a national bank, 12 U.S.C. §§ 21, 26-27; to examine the bank, *id.* § 481; to appoint a receiver to liquidate the bank's assets, *id.* §§ 55, 192-193; to appoint a conservator, *id.* § 203; and to seek forfeiture of the bank's charter, *id.* §§ 93, 501a. The Comptroller's examination authority over national banks is now set forth in a subchapter of the United States Code entitled "Bank Examinations." *See* 12 U.S.C. §§ 481-486. Section 481 directs the Comptroller to appoint examiners "to make a thorough examination of all the affairs of the bank and . . . make a full and detailed report of the condition of said bank to the Comptroller of the Currency."

The limitation on other exercises of visitorial powers against national banks is now found in 12 U.S.C. § 484, as part of the same subchapter. Section 484 provides:

> (A) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.
>
> (B) Notwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

B. State Authority as to National Banks

From the first establishment of a national banking system, consisting of private corporations organized under federal law and doing business in the several States, the general rule has been that both federal and state laws apply to national banks. *See generally Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (surveying the relevant history). Just five years after the enactment of the NBA, this Court observed that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869); *accord St. Louis*, 263 U.S. at 656.

States generally cannot limit or condition national banks' corporate powers, *see Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996), and cannot legislate "to promote the welfare and stability" of national banks themselves, *Easton v. Iowa*, 180 U.S. 220, 231 (1899). Otherwise, however, federal law preempts the application of state law to national banks only where state law conflicts with federal law or substantially interferes with national banks' exercise of their powers. *See Barnett Bank*, 517 U.S. at 33.

This Court has consistently recognized the right of state officials to sue national banks to enforce generally applicable state laws when those laws are not substantively preempted. *See, e.g., Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 659-60 (1924) ("*St. Louis*"); *Waite v. Dowley*, 94 U.S. 527, 534 (1876);

Pet. App. 50a-51a (Cardamone, J., concurring in part and dissenting in part) (collecting additional cases).[3]

In 1966 for the first time Congress gave the federal financial institution regulatory agencies, including OCC,[4] the power to enforce state law, albeit through administrative and not judicial proceedings. The Financial Institutions Supervisory Act of 1966 ("FISA"), Pub L. No. 89-695, tit. 2, 80 Stat. 1028, 1046-55, authorized these federal regulators to bring administrative proceedings where a depository institution that they regulate engages "in an unsafe or unsound practice" or violates "a law, rule or regulation," or any written condition imposed by the agency. 12 U.S.C. § 1818(b)(1). No suggestion was made at that time that this new authority to enforce state law administratively was intended to displace the authority of state officials to enforce state law against national banks.

In the 1990s, Congress reaffirmed the important role of state authority over national banks in the Riegle-

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3. The record contains evidence that over the past several decades, the New York Attorney General has investigated and settled against national banks claims of deceptive marketing, improper billing or debt collection practices, failure to disclose service fees, disclosure of personal data, and illegal collection of attorneys fees. J.A. 152a-157a. Until this case, national banks cooperated with the Attorney General's investigations. J.A. 154a-157a.

4. The federal financial institution regulatory agencies also include the Board of Governors of the Federal Reserve System, the FDIC, and the Office of Thrift Supervision. *See* 12 U.S.C. § 1813(q).

Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal"), Pub. L. No. 103-328, 108 Stat. 2338, and the Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 111 Stat. 238. Riegle-Neal eliminated barriers to interstate branching and simplified the complex rules for determining which state laws apply to branches of national banks. Congress expressly preserved the application of host state laws pertaining to consumer protection, fair lending, community reinvestment, and establishment of intrastate branches. In Riegle-Neal, Congress made clear that those four categories of state law apply to branches of national banks located in a State to the same extent that they do to branches of banks chartered by that State, unless the state law is preempted by federal law or would have a discriminatory effect on the national bank. 12 U.S.C. § 36(f)(1)(A). Riegle-Neal also specifically obligated OCC to enforce national bank branches' compliance with those four categories of state laws. *Id.* § 36(f)(1)(A)-(B).

Congress did not provide, however, that OCC had exclusive authority to enforce state laws against national banks, and the legislative history points in exactly the opposite direction. The Conference Report accompanying enactment of the original Riegle-Neal Act stressed that "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter the institution holds," identifying in particular States' "legitimate interest in protecting the rights of their consumers, businesses, and communities." It further explained that Congress did not intend Riegle-Neal to alter the federal-state balance "and

thereby weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

The Conference Report criticized OCC's practices in issuing "opinion letters and interpretive rules on preemption issues," finding that OCC had reached "inappropriately aggressive" conclusions regarding federal law preemption of state consumer protection and fair lending laws. *Id.* As a result, Congress required OCC to provide notice and an opportunity for comment before issuing opinion letters or interpretive rules concluding that federal law preempts the application to a national bank of state laws in any of the four listed categories. *See* 12 U.S.C. § 43. The Conference Report also confirmed that Riegle-Neal did not change the judicially established principle that "national banks are subject to State law in many significant respects," or disturb the settled "rule of construction that avoids finding a conflict between the Federal and State law where possible." H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074.

C. OCC's Visitorial Powers Rule

In 1971, OCC published an interpretive rule construing 12 U.S.C. § 484, titled "Books and Records of National Banks." *See* 36 Fed. Reg. 17,000, 17,013 (Aug. 26, 1971) (originally codified at 12 C.F.R. § 7.6025). That rule provided that "[t]he exercise of visitorial powers over national banks is vested in the Comptroller of the Currency," and that "[o]ther officials, including State banking officials, have no authority to conduct

examinations or to inspect or to require the production of books or records of national banks, except as authorized by law." *Id.* The 1971 rule expressly acknowledged that "[p]roduction of records may . . . be required [of national banks] under normal judicial procedures." *Id.* In 1996, OCC rephrased the rule and recodified it as 12 C.F.R. 7.4000, *see* 61 Fed. Reg. 4849, 4869 (Feb. 9, 1996), noting that the rule addressed "the exclusive examination authority of the OCC," *id.* at 4857.

In 1999, the Comptroller broadened the regulation dramatically. That year, OCC issued a new regulation, titled "Visitorial Powers," which expanded the definition of visitorial powers to include, among other things, "[e]nforcing compliance with any applicable . . . state laws concerning" activities authorized or permitted by federal banking law. 12 C.F.R. § 7.4000(a)(2)(iv) (1999). OCC interpreted this regulation to limit, for the first time, a State's ability to enforce its own valid and nonpreempted laws as they apply to the activities of national banks. *See* Pet. App. 109a. OCC took the position that the 1999 regulation barred state administrative actions against national banks, but permitted state officials to bring lawsuits to enforce nonpreempted state laws under the exception in § 484(a) for visitorial powers "vested in the courts of justice." *See* Pet. App. 109a.

In 2004, however, OCC issued an amended regulation to clarify the "extent of national bank activities subject to the OCC's exclusive visitorial authority," and also to limit the "authorized by Federal law" and "vested in the courts of justice" exceptions. *See* Rules, Policies, & Procedures for Corporate

Activities; Bank Activities & Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 6363, 6367 (Feb. 7, 2003) (notice of proposed rulemaking); *see also* Bank Activities & Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004) (final rule, codified at 12 C.F.R. § 7.4000). The 2004 rule gives examples of what OCC considers the limited circumstances in which exercises of visitorial powers by other governmental officials or agencies are authorized by federal law. *Id.* § 7.4000(b)(1). It also opines that § 484's "courts of justice" exemption "does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." *Id.* § 7.4000(b)(2). OCC interprets the visitorial powers rule to prohibit, among other things, a state attorney general from suing a national bank to obtain injunctive and monetary relief for violations of the State's nonpreempted consumer protection and antidiscrimination laws.

The 2004 rule, and the manner in which OCC adopted it, "generated considerable controversy and debate." U.S. GAO, OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process 5 (2005), *available at* http://www.gao.gov/new.items/d068.pdf. Forty-five state attorneys general objected to OCC's "efforts to divest the States of their historic role in protecting their residents from consumer fraud by all merchants, regardless of type." Comments and Recommendation of the Att'ys Gen. of Forty Five States, Puerto Rico, the U.S. Virgin Islands, & the Corp. Counsel of D.C. 2 (April 8, 2003).

D. Respondents' Suits to Enjoin the New York Attorney General From Enforcing New York's Antidiscrimination Laws Against National Banks

New York Executive Law § 296-a, like other state and federal laws, prohibits any person from discriminating on the basis of race, ethnicity, sex, or other specified characteristics in extending credit. New York Executive Law § 63(12) authorizes the New York Attorney General to apply to New York State Supreme Court for injunctive and monetary relief to redress repeated or persistent fraud or illegality. Section 63(12) also authorizes the Attorney General to issue subpoenas and take proof "[i]n connection with any such application" to the state court.

In April 2005, the Attorney General analyzed publicly available 2004 data disclosed by lenders pursuant to the Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801-2810, regarding high-interest residential mortgage loans in New York State. The Attorney General found significant racial and ethnic disparities in the interest rates charged by a number of state and national banks. The data showed that the banks issued a far greater percentage of high-interest loans to African-American and Hispanic borrowers than to white borrowers. J.A. 159a-160a, 167a.

On the basis of these disparities, the Attorney General sent "letters of inquiry" to the lenders, including several national banks and their operating subsidiaries, requesting that the lenders voluntarily produce more information. Shortly after this, OCC and

the Clearing House Association (a consortium of national banks) filed separate actions in the United States District Court for the Southern District of New York, invoking that court's jurisdiction under 28 U.S.C. §§ 1331 (general federal question jurisdiction) and 1345 (suits where federal agency is plaintiff). Relying on 12 C.F.R. § 7.4000, the federal suits sought to enjoin the Attorney General's enforcement efforts with respect to the national banks. OCC and the Clearing House took the position that "any efforts" by the Attorney General to investigate or enforce provisions of state or federal fair-lending law against national banks or their operating subsidiaries were an unlawful exercise of visitorial powers. Pet. App. 4a-5a. The Attorney General counterclaimed, seeking to have the regulation set aside under the Administrative Procedure Act as arbitrary, capricious, and contrary to law.

E. The District Court's Ruling

The suits for injunctive relief were consolidated. After a bench trial, the United States District Court for the Southern District of New York (Stein, J.) held that the Attorney General's enforcement activities were prohibited by 12 C.F.R. § 7.4000. Pet. App. 63a-117a, 118a-142a. The district court held that the term "visitorial powers" in § 484 is ambiguous, and concluded that OCC's regulation defining the term broadly to bar nearly all state enforcement of nonpreempted state laws against national banks was entitled to deference under *Chevron*. *Id.* at 81a-84a, 96a-106a.

The district court permanently enjoined the Attorney General from

> issuing subpoenas or demanding inspection of the books and records of any national banks in connection with his investigation into residential lending practices; from instituting any enforcement actions to compel compliance with the Attorney General's already existing informational demands; and from instituting actions in the courts of justice against national banks to enforce state fair lending laws.

Id. at 116a-117a.

F. The Court of Appeals' Decision

A divided panel of the Second Circuit affirmed the grant of injunctive relief. *Id.* at 42a. The majority concluded that OCC's interpretation of § 484(a), as embodied in 12 C.F.R. § 7.4000, was a valid exercise of OCC's statutory powers and was entitled to *Chevron* deference.

The court of appeals first rejected application of the presumption against preemption, concluding that no clear statement of congressional intent was required to justify OCC's interpretation because of the long history of federal regulation of national banks. *Id.* at 11a-12a.

Proceeding to step one of the *Chevron* analysis, the court concluded that "the precise scope of 'visitorial' powers is not entirely clear from the text of § 484(a), or

the common law background of the term," and that the court could not conclude that "the statute clearly precludes the interpretation OCC has adopted." *Id.* at 21a. The court found no such preclusion in the statutory exception for visitorial powers "vested in the courts of justice" because it found that exception likewise ambiguous. *Id.* at 22a-23a.

The court of appeals dismissed in a footnote this Court's decision in *St. Louis*, which upheld the Missouri Attorney General's enforcement of a state anti-branching statute against a national bank, despite arguments by the bank, and by the United States as amicus curiae, that the visitorial-powers statute precluded such enforcement. *Id.* at 21a n.8. The court observed that *St. Louis* did not expressly discuss the visitorial-powers statute and noted that at the time of the decision national banks were not authorized by federal law to establish branches. *Id.*

After concluding that the regulation was authorized under Congress's delegation of rulemaking authority to OCC, the court further held that OCC's interpretation of the statute was not unreasonable under step two of the *Chevron* analysis. It did so despite noting that "OCC's analysis [was] at or near the outer limits of what *Chevron* contemplates," since the agency had "accrete[d] a great deal of regulatory authority to itself at the expense of the state through rulemaking lacking any real intellectual rigor or depth." *Id.* at 25a-26a. The court further observed that OCC did "not appear to find any facts at all in promulgating its visitorial powers regulation." *Id.* at 25a. The court of appeals nonetheless concluded that "[i]n drawing the

lines that it did in § 7.4000(a), OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute." *Id.* at 28a.

Judge Cardamone dissented from the affirmance of the injunction. Pet. App. 42a-62a (Cardamone J., concurring in part and dissenting in part). In his view, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001), and *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991), required a clear statement of congressional intent to sustain OCC's regulation because the regulation "ha[d] altered the compact between the state and national governments." Pet. App. 42a; *see also id.* at 54a-55a. He noted that "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." *Id.* at 54a. He considered the "likely result" of this "a plain transgression on our republican form of government and a violation of the Tenth Amendment." *Id.* Judge Cardamone noted not only the absence of a clear statement of congressional intent to reach this far, but also the "clear" fact that "virtually from the inception of the National Bank Act the term [visitorial powers] was not understood to preclude state enforcement of nonpreempted state laws." *Id.* at 50a. He noted that Congress has emphasized both the general importance of the dual banking system, and more specifically, States' strong interest in protecting the rights of their consumers, businesses, and communities. *Id.* at 52a

(quoting H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074).[5]

SUMMARY OF ARGUMENT

OCC has invoked 12 C.F.R. § 7.4000 (the "Regulation") to bar the Attorney General from enforcing New York's fair-lending law against national banks, even though it is undisputed that New York's law is not preempted in its application to those banks. This regime of "enforcement preemption" is inconsistent with the text of § 484, which OCC's regulation purports to construe.

Section 484 prohibits States from exercising "visitorial powers" over national banks. The term "visitorial powers" in the NBA cannot reasonably be construed to encompass state enforcement of state consumer protection and antidiscrimination laws that are validly applied to national banks. The term derives from the common law, and it refers to supervisory authority that a chartering government exercises over corporations that it charters. Visitation has never been synonymous with enforcement of generally applicable laws. This fact is confirmed by eighteenth and nineteenth century treatises, and by numerous decisions of this Court that permit States to enforce their valid laws against national banks. Perhaps most significant

5. The court of appeals unanimously vacated that portion of the district court's order enjoining the Attorney General from investigating or suing the banks under the federal Fair Housing Act because it considered the claim unripe. *See* Pet. App. 32a-41a; *id* at 43a (Cardamone, J., concurring in part and dissenting in part).

is *St. Louis*, in which this Court rejected arguments by the United States and a national bank that a state attorney general's suit to enforce the national bank's compliance with state antibranching laws was barred by the visitorial-powers statute. *See* 263 U.S. at 659-60.

More recent federal legislation confirms the implausibility of OCC's position that the statute deprives the States of the authority to enforce their consumer protection and fair lending laws against the banks. In 1966, Congress gave OCC the power to enforce state law administratively, but did not indicate any intent to preclude state enforcement and did not provide OCC with the full scope of remedies available to the States. *See* FISA, Pub. L. 89-695, tit. 2, 80 Stat. at 1046-55. In 1994, Congress directed OCC to administratively enforce, inter alia, state consumer protection and fair-lending laws against interstate branches of national banks, but did not withdraw the authority of the States to enforce those laws, and made clear its intent that the laws be vigorously enforced. *See* 12 U.S.C. § 36(f)(1)(A)-(B); H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074.

OCC has not identified any legitimate purpose served by its interpretation, and it is difficult to imagine any special burden imposed on the banks by ordinary state law enforcement, particularly given that States' consumer protection and antidiscrimination laws remain enforceable against national banks by private plaintiffs, including in large class actions.

The court of appeals upheld OCC's odd regime of enforcement preemption by deferring to the Regulation under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But *Chevron* deference has no application here for several reasons. First, the Regulation is inconsistent with the plain meaning of the statute it purports to interpret. Second, OCC's interpretation would work a major alteration in the federal-state balance of authority, and therefore triggers the clear-statement rule of *Gregory v. Ashcroft*; because Congress itself could not accomplish such a result without a clear statement, an agency cannot do the same thing without clear authorization from Congress. Third, *Chevron* deference does not extend to a regulation that declares the preemptive scope of a federal statute, because the agency has no distinctive institutional competence to determine the preemptive scope of a federal statute, and it is implausible that Congress would intend to delegate such a determination to an agency, rather than relying on the courts to interpret a statutory preemption clause.

ARGUMENT

I. OCC's Expansive Interpretation of the Term "Visitorial Powers" Is Inconsistent with the Established Meaning of the Term as Used in 12 U.S.C. § 484(a)

Section 484(a) prohibits state officials (and others) from exercising visitorial powers over national banks, with limited exceptions. The term "visitorial powers" thus defines the scope of preemption effected by § 484(a). That term is not synonymous with general law

enforcement, as the Regulation declares. Instead, consistent with the term's longstanding historical meaning as confirmed by decisions of this Court, the term "visitorial powers" refers to supervisory authority over corporations, including the authority to grant charters, appoint receivers, sue to forfeit charters, and conduct routine on-site examinations to monitor the safety and soundness of national banks and compliance with their federal charters.

This supervisory authority is entirely distinct from the authority to bring lawsuits to enforce generally applicable law. The term "visitorial powers" has long been used to describe a class of special powers exercisable over a corporation by the chartering sovereign; earlier it was used to describe a class of special powers exercisable over a charity by a private "visitor" who was usually the donative founder of the organization. *See, e.g.*, Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 659-60 (1866).

Contrary to the ruling below, § 484(a) cannot reasonably be interpreted to prohibit state officials from undertaking ordinary enforcement of nonpreempted state laws against national banks. This point is demonstrated by the text, structure, and purpose of § 484(a), and by treatises, decisions of this Court, and other sources showing the longstanding meaning of "visitorial powers." Therefore, the statute clearly precludes OCC's interpretation, as embodied in the Regulation. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 596-600 (2004) (no deference afforded to agency construction that is "clearly wrong"); *FDA v.*

Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000) (no deference where "Congress has directly spoken to the issue" and precluded the agency's jurisdiction); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994) (no deference to agency interpretation that "goes beyond the scope of [any statutory] ambiguity").

A. Congress Used The Term "Visitorial Powers" in Section 484(a) to Refer to Supervisory Oversight and Examination of Banks, and Not Enforcement of Generally Applicable Law

1. Section 484(a) was enacted to resolve whether the power to supervise the new national banks through banking examinations would be shared between the national government and the States, or whether it would rest exclusively with the national government. Before enactment of the NBA, the chartering of private banks, and corporations more generally, had been exclusively a state function. *See* H. Rep. No. 103-448, at 19 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2039, 2043. Congress modeled the national banking system on the regulatory regime New York had developed to oversee its own banks, John Jay Knox, *A History of Banking in the United States* 404, 405, 422 (1903), but gave a federal official – the Comptroller – enumerated supervisory powers over the banks. The Comptroller was authorized to charter and examine the national banks, appoint receivers to take possession of failing banks, and sue to have forfeit the charters of banks that willfully violated the NBA. Congress invoked a then-familiar common law term of corporate governance – visitation – to clarify that the States, traditionally the supervisors of private

corporations doing business within their jurisdictions, had no authority to examine the condition of a national bank, respond to any perceived financial risk, or hold the bank to its charter or the laws of its creation.

In the legislative debates, one senator proposed that the States should have "the right of visitation" over national banks, such that national banks would "be examined by the States." Cong. Globe, 37th Cong., 3d Sess. 824 (1863) (Sen. Clark). The senator argued that "it [would] give confidence to the institutions within the States if the State had the right of visitation, and could know how [the banks] stood." *Id.* Otherwise, the senator suggested, there "would be a want of information in the State[s]." *Id.* The Act's sponsor responded that a right of visitation in the States was unnecessary because "[t]he bill itself [was] very full and very stringent on the subject of examination," and argued that it would be "unwise to allow state authorities to interfere with [a national bank's] organization." *Id.* (Sen. Sherman). The sponsor's view ultimately prevailed, and Section 51 of the 1863 act made clear that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." Act of Feb. 25, 1863, National Currency Act, ch. 58, § 51, 12 Stat. at 679-80.

Thus, in prohibiting States from exercising visitorial powers, Congress was largely concerned to prevent States from conducting banking examinations, which are the foundation of banking supervision. A banking examination is a periodic on-site review of a bank, aimed at early detection of unsafe and unsound practices, that typically focuses on matters like the quality of bank

assets, adequacy of capital structure, concentration of credit, loans to insiders, quality of management, and internal bank controls. *See* U.S. GAO, *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending* 42 (2004); 5 Senate Gov't Affairs Comm., 95th Cong., *Study on Federal Regulation* xiv-xv, xviii (Comm. Print 1977). The power to engage in this routine monitoring is largely what distinguishes a supervisory agency, like OCC or a state banking commission, from a law enforcement agency, like the Attorney General. *See* GAO, *Consumer Protection*, *supra* at 53 (contrasting "supervisory agency" with "routine monitoring and examination responsibilities" with a "law enforcement [agency] focused on conducting investigations in response to consumer complaints and other information"); Nat'l Comm'n on Consumer Fin., *Consumer Credit in the United States* 53 (1972) ("[U]nlike the financial regulatory agencies, attorneys general have no general supervisory or examination powers.").

The original location of the visitorial-powers clause amid provisions addressing the Comptroller's own examination authority confirms that Congress's principal aim was to prohibit States from conducting examinations of national banks. In the 1863 Act, the visitorial-powers prohibition was preceded by a provision directing the Comptroller to appoint persons "to make a thorough examination into all the affairs of [every banking] association" and to "make a full and detailed report of the condition of the association to the comptroller," and was followed by a sentence concerning

the compensation due to examiners. Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116.[6]

2. A review of early corporations treatises confirms that enforcement of general laws that apply equally to all actors within a State, like the ban on discrimination found in New York Executive Law § 296-a,[7] has never been considered an exercise of visitorial powers. A classic treatise from the late eighteenth century, for example, explains, in regards to visitation, that "[i]n order to maintain the peace and good government of corporations, and to secure their adherence to the purposes of their institution, the law has appointed a tribunal to inspect the conduct of their internal affairs."[8]

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6. Further confirmation is provided by an early District of Columbia statute, also enacted by Congress, stating that the Comptroller "shall have and exercise the same visitorial powers over the affairs of [trust companies] as [are] conferred upon him by [Section 5240] of the Revised Statutes . . . of the United States in the case of national banks." Act of March 3, 1901, ch. 854, § 720, 31 Stat. 1303, 1304. At the time, the cross-referenced section set forth the Comptroller's examination authority.

7. Executive Law § 296-a is a generally applicable provision prohibiting discrimination in any extension of credit within New York State. It applies not only to banks, but also to brokers, finance companies, payday lenders, retailers, tax preparers (refund anticipation loans), and all others who extend credit. Moreover, the preceding section of New York's Executive Law, § 296, prohibits discrimination in employment, public accommodations, public housing, education, and other activities.

8. Except in emergency situations, courts still today decline jurisdiction in suits requiring "true visitation" over (Cont'd)

Stewart Kyd, *A Treatise on the Law of Corporations* 174 (1794). In discussing visitation of a college, Kyd observes: "The power of the visitor is confined to offences against the *private* laws of the college; he has no cognizance of acts of disobedience to the general laws of the land." *Id.* at 276.

Later treatises continue to distinguish enforcement of general laws from visitation, which is concerned with the rules and laws specific to the institution. A treatise from 1850, for example, explains as to visitors of universities:

> [The visitor's] province and duty [is] to see that the institution conforms to the rules and regulations that the founder has laid down, called in this case statutes, and to maintain order generally, but not to take cognizance of offences which are such by act of parliament, or the common law, independently of the statutes of the institution.

James Grant, *A Practical Treatise on the Law of Corporations in General, as Well Aggregate as Sole* 517 (1850). Another also draws a clear line between the State's general power over all corporations and persons,

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(Cont'd)

foreign corporations – e.g., suits seeking annulment of the election of a corporate director. *See* 17 Fletcher's Cyclopedia of Corporations § 8427 (2006). Courts sometimes exercise jurisdiction over suits that merely involve some consideration of a foreign corporation's internal affairs, but typically apply the law of the chartering jurisdiction. *Id.*; *see id.* § 4223.50.

and its special visitorial power over corporations in certain circumstances: "The state, by permitting actions at law and suits in equity, exercises general control over corporations as over other persons. But the state also exercises, by visitation through the courts or commissions, special control over corporations under certain circumstances." 8 Horace Lafayette Wilgus, *American Law and Procedure: Private Corporations* 220 (1911).

Here, the New York Attorney General does not propose to conduct a bank examination or to supervise any bank's safety and soundness, internal organization, or charter compliance. Nor does it seek to appoint a receiver or revoke a bank's charter. Rather, the Attorney General seeks the ability to bring lawsuits in state court to enforce New York's fair lending laws, and to conduct targeted investigations in contemplation of such lawsuits. Section 484(a) was not intended to immunize national banks from such ordinary-law enforcement.

3. This Court's decisions have consistently recognized the distinction between supervisory oversight of a bank and enforcement of other valid legal obligations of the bank. *Guthrie v. Harkness*, 199 U.S. 148 (1905), is the only decision of this Court expressly discussing the NBA's visitorial powers provision. *Guthrie* held that a private shareholder's right to inspect bank records is not a right of visitation, and that a court order compelling bank officers to permit such an inspection, even if arguably an exercise of visitorial powers, is protected under the exception for such powers "vested in courts of justice." *Id.* at 159. The

Court concluded that the shareholder's right of inspection was not visitorial in nature, because it was not part of the general oversight of a corporation to ensure that it complies with its charter and by-laws, but rather derived from the separate common law right of a shareholder to examine the methods and means by which the corporation conducts its affairs, in order to ascertain the value and legal status of his investment. *Id.* at 157-59.

The fact that the record-seeker in *Guthrie* was a private individual tended to corroborate that he was not seeking to exercise visitorial powers, but it was not critical to the decision, contrary to view of the court below. Pet. App. 23a. Instead, the decision rests on the fact that the record-seeker was enforcing his own rights, which were separate in nature from, and not preempted by, the Comptroller's right to examine the bank's records. *Guthrie*, 199 U.S. at 156-59. In short, the statute did not preclude the shareholder's right of inspection in *Guthrie* because that right was not part of any supervisory oversight regime. Likewise, § 484(a) does not prohibit the Attorney General's enforcement of New York's valid fair-lending law, including but not limited to review of bank records, because such enforcement is not part of any supervisory oversight regime.

Indeed, from the beginning, this Court has recognized that States can enforce their generally applicable laws against national banks where those laws are not preempted. In *National Bank v. Commonwealth*, 76 U.S. 353, 363-64 (1869), decided just five years after enactment of the NBA, this Court affirmed a state court judgment obtained by Kentucky to compel a national

bank to remit to the State a tax levied on stockholders' shares in the bank. Shortly thereafter, in *Waite v. Dowley*, 94 U.S. 527, 534 (1876), the Court affirmed a judgment obtained by a town treasurer against the cashier of a national bank for failing to comply with a state law requiring the bank to provide information about its shareholders for tax purposes. Likewise, in *First National Bank of Bay City v. Fellows*, 244 U.S. 416, 427-28 (1917), the Court held that the Michigan Attorney General could sue a national bank in state court to test whether the bank could provide trust services, where the bank's authority was dependent on whether state law provided the same right to analogous state entities.

In *St. Louis*, the bank and the United States as amicus curiae argued, among other things, that Missouri's quo warranto action seeking to prohibit the bank from violating the state antibranching laws was barred as a prohibited attempt to exercise "visitorial powers" reserved solely to the Comptroller. 263 U.S. at 643, 645.[9] The Court rejected that argument without discussion, in effect applying the settled distinction between supervision of the corporate charter and enforcement of other valid laws. The Court observed that state officials may not "inquire by quo warranto whether a national bank is acting in excess of its charter powers," *id.* at 660, or sue to inquire whether a national bank "is complying with the charter or law of its creation," *id.* However, the Court held that Missouri was not attempting to do either of these things, but was

9. The reference is to the portion of the official syllabus setting forth the arguments of the parties.

merely seeking "to vindicate and enforce its own law." *Id.* The decision thus defines the same boundary set forth above to separate visitorial enforcement from ordinary enforcement: charter supervision is visitorial, enforcement of valid general laws is not.[10]

The idea that the NBA might prevent a State from enforcing its own valid and unpreempted law was flatly rejected by the *St. Louis* Court, and for reasons that cannot be overturned by agency fiat. *St. Louis* noted that it would be incongruous to separate the power of a sovereign State to enact a law and the power of that State to enforce it. In rejecting the claim that the NBA barred a State from enforcing its laws against a national bank, the Court asked only "whether the state law [was] free to act" or whether the state law was preempted under principles of conflict preemption. *Id.* at 660. It considered whether the state law would frustrate the purpose for which the bank was created, interfere with its operations, or impair its efficiency. *Id.* at 659. The Court concluded that Missouri's prohibition on branching could not conflict with the National Bank Act

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10. The three dissenters in *St. Louis* did not dispute this rule, but merely disagreed with the majority's characterization of Missouri's lawsuit. In the dissent's view, the lawsuit pertained to "questions of corporate power," not enforcement of "general laws," and therefore was the Comptroller's alone to bring under federal law. 263 U.S. at 665-66 (Van Devanter J., dissenting). The dissent would have found Missouri's antibranching law substantively preempted, on the ground that questions of national banks' powers "must turn on the laws of the United States under which the bank is created," and that state law "simply has no bearing on the solution of [such questions]." *Id.*

because, at the time, federal law generally did not permit national banks to operate branches.[11]

Once the Court determined that the state law at issue was not preempted by federal law, it held that the state attorney general's power to enforce the law through judicial proceedings necessarily followed. *Id.* at 659-60. The Court reasoned that "since the sanction behind [the state law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *Id.* at 660. The Court explained that "[t]o demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *Id.*

After *St. Louis*, this Court permitted enforcement of state laws against national banks that arguably struck closer to visitation. In *Anderson National Bank v. Luckett*, 321 U.S. 233, 252-53 (1944), this Court held that a State could enforce its abandoned property laws against national banks, and, "as an appropriate incident to this exercise of authority," could require national banks to submit periodic reports of inactive accounts.[12]

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11. Certain national banks, but not that petitioner, did have limited power to operate branches at the time of *St. Louis*. *See* 263 U.S. at 657-58.

12. The Comptroller, as amicus curiae for the bank, argued primarily that the whole state statute was substantively preempted. Brief of the Comptroller of the Currency as Amicus (Cont'd)

And in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 129-30 (1969), this Court held that a national bank was not entitled to declaratory and injunctive relief against a state comptroller's letter ordering the bank to cease and desist branching activities prohibited by state law.

Contrary to the decision below, Pet. App.18a-21a, no light is shed on the scope of the term "visitorial powers" by *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). *Watters* held that the Michigan Office of Insurance and Financial Services (OIFS) was preempted from exercising "general supervision and control" over a state-chartered operating subsidiary of a national bank. *Id.* at 8. The Court was not asked to address, and did not address, any question about the scope of the term "visitorial powers" in § 484(a), because Michigan had conceded that its "licensing, registration, and inspection requirements" would be precluded as applied to the national bank. *Id.* at 1569. The only issue was whether the bank's operating subsidiary should benefit from the same preemption standard. In concluding that Michigan's administrative regime does not apply to the subsidiary, the Court commented that subjecting the subsidiary to "multiple audits and surveillance under rival oversight regimes" would interfere with the business of banking. *Id.* at 21. But, consistent with the

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Curiae, *Anderson Nat'l Bank v. Luckett*, No. 43-154, at 2-17. Its alternative argument of procedural preemption under § 484 was aimed not at all state enforcement of the law, but only at a section authorizing examinations, which the Comptroller called the "visitorial provisions" of the statute. *Id.* at 17-18.

above analysis of visitation, the Court's comment plainly refers to "oversight regimes,"[13] not to enforcement of generally applicable state laws.[14]

B. No Doubt is Cast on this Settled Understanding by Subsequent Legislation or the Exceptions Contained in or Added to the Statute

1. OCC has suggested that the Regulation finds support in the fact that the agency now has the power to enforce valid state laws through administrative proceedings. But that analysis is entirely anachronistic. Congress conferred that power on OCC in 1966, while the visitorial-powers prohibition has existed, essentially unchanged, since 1863. Thus, if the 1863 statute prohibited the States from enforcing their valid state laws against national banks, or even permitted that interpretation, then it would follow that for over a century no governmental authority had the power to enforce valid state laws against national banks. That simply cannot be the law. As this Court observed in *St. Louis*, the notion that state law could apply to

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13. The OIFS conditions a mortgage company's ability to do business in the State on registration and payment of fees, compliance with record keeping and reporting requirements, and submission to periodic inspections, among other things. *Id.* at 13-15.

14. The court of appeals' reliance on *First National Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981 (3d Cir. 1980), Pet. App. 21a, is similarly misplaced. *Long* held that § 484 prohibited administrative enforcement of state anti-redlining laws by a state banking commissioner, but did not address judicial enforcement.

national banks, but be enforceable by no government, is a "fallacy made apparent by the mere statement of the proposition." 263 U.S. at 660. Enforcement power, the Court held, is "inherent in the very conception of law." *Id.*

Neither is it plausible that Congress intended to broaden the preemptive effect of § 484(a) when it gave OCC administrative power to enforce state law in FISA in 1966. *See* 12 U.S.C. § 1818(b)(1). FISA did not amend § 484(a). Nor did FISA overrule *St. Louis* or any of the other cases cited above. Instead, FISA was designed to give the federal financial institution regulatory agencies some intermediate administrative remedies less drastic than those that the agencies already possessed, such as revocation of federal insurance or membership in the Federal Reserve. *See* S. Rep. No. 89-1482, at 5-6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3532, 3537-38. The statute does not single out OCC, does not expressly mention state law, and does not provide that the federal agencies' new administrative powers are meant to be exclusive of concurrent state authority.[15] Moreover, FISA did not give OCC the same powers that state attorneys general have to order compensation to injured consumers. *See* 12 U.S.C. § 1818(b)(6)(A)(OCC may order restitution and similar remedies only where the financial institution was unjustly enriched or

15. As to the federal agencies that regulate state-chartered entities, like the FDIC or the Board of Governors of the Federal Reserve, it is clear that those administrative powers are *not* exclusive. *See* 12 U.S.C. § 1818(m) (requiring federal agencies to notify the appropriate state supervisory authority and give the state supervisory agency an opportunity to take corrective action before commencing federal administrative proceedings).

manifested reckless disregard for the law). Finally, the Senate committee report on FISA expressly disclaimed any intent "to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system." S. Rep. No. 89-1482, at 7, *reprinted in* 1966 U.S.C.C.A.N. at 3538.

2. Nor do the 1994 Riegle-Neal amendments preempt state enforcement of valid state laws. Riegle-Neal expressly directs that host state laws in four areas of traditional state regulation and concern — consumer protection, fair lending, community reinvestment, and intrastate banking — generally should apply to out-of-state branches of national banks, except where the laws would be preempted as to the parent national bank. 12 U.S.C. § 36(f)(1)(A), (f)(2); *see also* H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074. While the statute provides that "any State law to which a branch of a national bank is subject under this paragraph shall be enforced . . . by the Comptroller of the Currency," 12 U.S.C. § 36(f)(1)(B), the provision cannot fairly be read to give the agency exclusive enforcement authority, because the clause does not use the word "exclusive" or otherwise indicate any intent to deprive States of concurrent enforcement power, and the legislative history forecloses this radical reading of the provision.

Senator Riegle explained that "the States [would] not lose any authority that they already ha[d] over national banks," and that the bill was intended "to maintain the status quo regarding a State's ability to regulate the activities of national banks operating in that

State." 140 Cong. Rec. 8642 (1994). Likewise, the Conference Report acknowledged that "States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds," and stated that "Congress [did] not intend . . . [to] weaken States' authority to protect the interests of their consumers, businesses, or communities." H.R. Conf. Rep. No. 103-651, at 53, 1994 U.S.C.C.A.N. at 2074.

Moreover, Congress made clear its intent that state consumer protection and fair-lending laws be vigorously enforced. *See, e.g.*, Riegle-Neal, Pub. L. No. 103-328, § 102(b), 108 Stat. at 2349-50 (codified as amended at 12 U.S.C. § 36(f)(1)-(2)); H.R. Conf. Rep. No. 103-651, *supra*, at 53, 1994 U.S.C.C.A.N. at 2074. To the limited extent OCC can and actually does take steps to aid individuals harmed by national banks' illegal practices, those efforts serve Congress's stated goals. But it is not likely that Congress intended to deprive consumers of the additional enforcement resources and broader remedial powers that state attorneys general have long brought to bear on those concerns. It is especially unlikely given OCC's structure and resources that Congress intended OCC's administrative enforcement capacity to supplant the enforcement role traditionally played by state attorneys general. *See* Nicholas Bagley, Note, *The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2309 (2004) (observing that "OCC [i]s [n]ot a [c]onsumer [p]rotection [a]gency"); Christopher L. Peterson, *Federalism and Predatory Lending; Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 73 (2005)

(OCC's focus has always been "monitoring the safety and soundness of their institutions, rather than consumer protection"). Indeed, OCC has informed the GAO that it does not even have procedures for examining compliance with state law. *See* U.S. GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 22-23 (2006). States, by contrast, have expertise and experience in enforcing their own laws. States are more familiar with local conditions and practices than is the federal government and can more quickly recognize and respond to new predatory practices as they arise, especially as national banks and their subsidiaries expand into nonfinancial areas. *See, e.g.*, Peterson, *supra*, at 61-68.

In light of these unequivocal indications of Congress's intent, both in 1966 and in 1994, to maintain the existing balance between federal and state authority, it is implausible that Congress intended on either occasion to divest States of the authority to enforce valid state laws against national banks. OCC did not consider either act a watershed at the time of its passage. OCC itself initially took the position that its power under FISA to initiate cease-and-desist proceedings for violations of "a law, rule, or regulation" did not encompass violations of state law. *See* Nat'l Comm'n of Consumer Fin., *Consumer Credit in the United States* at 54. And until 2004, the agency acknowledged that state officials could bring lawsuits to enforce state laws against national banks. *See* Pet. App. 109a.

3. OCC has suggested that the statutory exceptions contained in § 484 provide support for its overbroad

interpretation of "visitorial powers," but they do not. Each of these exceptions was written to resolve a dispute about whether certain actions might be seen as a prohibited exercise of visitorial powers. The exceptions serve a clarifying role; they do not imply that actions within their scope are necessarily visitorial, but merely foreclose any argument that the covered actions are prohibited by the statute.

The exception for visitorial powers "vested in the courts of justice" was characterized in just that way by this Court in *Guthrie v. Harkness*, 199 U.S. 148. In that case, the Court held that it was "evident" from that exception that the statute did not prevent a court from compelling a national bank to afford a shareholder access to the bank's books and records for inspection. *Id.* at 159. The Court did not hold that such a court order was an exercise of visitorial powers, but rather concluded that "even if [such an order were] included in visitorial powers as the terms are used in the statute, it would belong to that class 'vested in courts of justice' which are expressly excepted from the inhibition of the statute." *Id.*[16]

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16. The court of appeals found *Guthrie* inapplicable to this case on the ground that reading the exception for "courts of justice" so broadly "would swallow the rule." Pet. App. 114a. The court was mistaken. Neither *Guthrie* nor this case requires the conclusion that every resort to the courts is embraced by the exception for "courts of justice." To the contrary, both *Guthrie* and this case involve a request for records that arises from a nonpreempted substantive claim. If the underlying claim were preempted, resort to the courts would not overcome that obstacle.

So too the statutory exception for visitorial powers "exercised or directed by Congress" or by a House or committee thereof serves a similar clarifying role. That provision was enacted as part of the Federal Reserve Act of 1913, in a provision captioned "Limit of other examinations." Federal Reserve Act, ch. 6, § 21, 38 Stat. 251, 272 (1913). In 1912 the U.S. Attorney General had opined that the House Committee on Banking and Currency lacked the power to direct the Comptroller to use its examination authority to procure information from national banks for the committee to use in considering amendments to the banking and currency laws. *See* 29 Op. Att'y Gen. 555 (1912). Earlier the House Committee on Banking and Currency had expressed a similar concern. *See* H.R. Rep. No. 62-665, at 1 (1912). Members of the committee proposed a statutory amendment "to remove the doubt and to prevent the investigation from becoming abortive by being tied up in litigation." *Id.* Although the proposed amendment did not pass in 1912, a similar provision was added to § 484 the following year as part of the Federal Reserve Act.

Likewise, the enactment of § 484(b) in 1982, affirmatively permitting state examiners and auditors to inspect national banks' records for compliance with state abandoned property and escheat laws, was intended to resolve a dispute about the meaning of the visitorial-powers statute. Decades before, in *Anderson National Bank*, 321 U.S. 233, this Court had made clear that States generally could enforce such laws against national banks and, incident to such enforcement, could require national banks to submit annual reports to the State. *Id.* at 252-53. However, in the 1970s OCC advised that, in its view, § 484 "probably" prohibited the States

from examining banks for compliance with abandoned property laws. *See Bank Treatment of Inactive Checking and Savings Accounts: Hearings before a Subcomm. of the House Comm. on Government Operations*, 96th Cong. 23 (1980) (statement of Jim Lord, Treasurer, State of Minnesota). The contrary view was suggested by the Congressional Research Service, *id.* at 408, and endorsed by the Minnesota Supreme Court, *Minnesota ex rel. Lord v. First Nat'l Bank*, 313 N.W.2d 390 (Minn. 1981). *See Clovis Nat'l Bank v. Callaway*, 69 N.M. 119, 130-31, 364 P.2d 748, 755-56 (1961). Congress conclusively resolved the dispute by adding subsection (b) to § 484, providing that "[n]otwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."[17]

C. OCC's Novel Theory of "Enforcement Preemption" Does Not Serve Any Legitimate Goals of the National Banking System

OCC has not demonstrated how its novel theory of "enforcement preemption" is needed to serve the legitimate goals of the national banking system.

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17. A similar clarifying purpose is served by 26 U.S.C. § 3305(c), which provides that "nothing contained in . . . [12 U.S.C. § 484]" shall prevent States from requiring national banks to submit reports to state unemployment compensation systems. Absent § 3305(c), some might question whether States could compel such periodic administrative reporting by national banks. The statute makes clear that States may do so.

Enforcement preemption does not serve to protect national banks from conflicting or unduly burdensome standards of conduct; if state law created such conflicts or burdens, the state law would be substantively preempted. When state substantive law is not preempted, national banks must conform their conduct to that law.

Nor is there any basis to think that Congress considered ordinary law enforcement, to which all persons and entities are typically subject, to be especially burdensome or harmful to national banks. OCC has not identified any such harm, nor could it, as private plaintiffs may sue national banks in state court for violations of the very same fair-lending and consumer protection laws that respondents would prevent state attorneys general from enforcing. *See* Pet. App. 87a.[18] Indeed, private litigation may proceed in the form of a class action.[19] To justify its regulation, the agency has

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18. In the area of fair housing, moreover, state authorities that are certified by HUD to process complaints may sue national banks. *See* Pet. App. 133a. The FHA authorizes HUD to certify state or local agencies to process FHA complaints pursuant to state or local law if HUD determines that such law is substantially equivalent, both substantively and procedurally, to the FHA. 42 U.S.C. § 3610(f). Once HUD has certified a state or local agency, it is required to refer all complaints of discrimination within their geographic jurisdiction to those agencies for processing pursuant to state or local law and procedures. *Id.*

19. *See, e.g., Hood v. Santa Barbara Bank & Trust*, 143 Cal. App. 4th 526, 541-42 (Cal. Ct. App. 2006) (putative class action

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referred to concepts of "uniformity," *see Bank Activities and Operators*, 69 Fed. Reg. 1895, 1896 (Jan. 13, 2004), but this Court has pointedly observed, in specific reference to federally chartered depository institutions, that merely "[t]o invoke the concept of 'uniformity' . . . is not to prove its need." *Atherton*, 519 U.S. at 220; *see also id.* at 223 ("To point to a federal charter by itself shows no conflict [or] threat. . . .").

Nor can OCC invoke any congressional preference for a federal forum to resolve all allegations against national banks. Since 1864, the NBA has made national banks subject to suit in state court. Act of June 3, 1864, ch. 106, § 57, 13 Stat. 99, 116-17; *see also Fellows*, 244 U.S. at 428 (finding that § 57 "fortified" its holding that state attorney general could bring quo warranto action against national bank in state court). Furthermore, while for a brief time national banks could remove any suit against them to federal court, *see Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648-49 (1892), for over a century federal law has limited a national bank's ability to remove a state suit to situations where a state-chartered bank would likewise have the ability to remove the suit. *See* 28 U.S.C. § 1348; *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 310-11 (2006); *cf.* 28 U.S.C. § 1442(a) (giving federal agencies and officers the right

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not barred by § 484(a)); *Muhammad v. Nat'l City Mortgage, Inc. f/k/a Nat'l City Mortgage Co.*, No. 2:07-cv-0423, 2008 WL 5377783 (S.D. W. Va. Dec. 19, 2008) (approving $700,000 class-action settlement against national banks); *see also Bank of Am., N.A. (USA) v. Miller*, No. S-06-1971, 2007 WL 184804 (E.D. Cal. Jan. 17, 2007) (action against national bank by consumer group not barred by § 484(a)).

to remove to federal court suits based on acts taken under color of their office); § 1442a (same as to members of the United States armed forces).

Under OCC's interpretation of § 484, preemption turns not on the substance of state law or any perceived need for a federal forum to adjudicate claims or defenses, but on the mere fact that the plaintiff filing the suit is a state official. It is implausible that Congress authorized the adoption of a scheme so arbitrary, yet at the same time so destructive of States' dignity and traditional authority.

II. OCC 's Regulation Cannot Receive Deference Under *Chevron* Because It Profoundly Shifts the Federal-State Balance and Purports to Define the Preemptive Scope of a Statute.

Even if the Regulation contained a plausible construction of § 484 (and it does not), it would not be entitled to the *Chevron* deference accorded to it by the courts below for at least two reasons. First, OCC's interpretation shifts the federal-state balance in a way that can be sustained only on a clear statement of congressional intent, not on an agency's interpretation. Second, because the Regulation declares the preemptive scope of a federal statute, it is not eligible for *Chevron* deference.

A. OCC's Regulation Preventing a State From Enforcing Its Own Valid Law So Drastically Alters the Federal-State Balance as to Require a Clear Statement from Congress That Is Not Present Here

1. As shown below, the aberrant nature of the preemption regime that the Regulation purports to establish, under which state substantive law applies but only a federal agency and private parties may enforce that law, would work a major alteration in the federal-state balance of authority, and therefore triggers the clear-statement rule of *Gregory v. Ashcroft*, 501 U.S. 452. For that reason alone, *Chevron* deference must be denied. Even where a statute is ambiguous and therefore susceptible of multiple interpretations, if the particular interpretation chosen by the agency enters terrain protected by a clear-statement canon, the construction is necessarily beyond the range of permissible interpretations eligible for *Chevron* deference. To hold otherwise would permit an agency to circumvent clear-statement rules that are binding on Congress.

The *Gregory* clear-statement rule is triggered here because the "enforcement preemption" contemplated by OCC's regulation is destructive to our tradition of federalism and distorts the lines of political accountability that are the foundation of that tradition. As this Court has recognized, the "great innovation" of our federalist system

> was that "our citizens would have two political capacities, one state and one federal, each

> protected from incursion by the other" – "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

Printz v. United States, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). "This separation of the two spheres is one of the Constitution's structural protections of liberty." *Id.* at 921.

This Court has held that the lines of political accountability defining these two spheres are impermissibly distorted when the federal government "commandeers" state executive officials to enforce federal regulatory programs. *Id.* at 925; *see also New York v. United States*, 505 U.S. 144, 161 (1992). Such commandeering is prohibited because it puts States "in the position of taking the blame for [a federal program's] burdensomeness and for its defects," *Printz*, 521 U.S. at 930, meaning that state officials may bear "the brunt of public disapproval," while federal officials are "insulated from the electoral ramifications of their decisions," *New York*, 505 U.S. at 169.

Respondents' construction of § 484(a) would likewise erode the lines ensuring that both federal and state governments remain accountable to citizens. As this Court has observed, state law

> can always be pre-empted under the Supremacy Clause if it is contrary to the

> national view, but in such a case it is the Federal Government that makes the decision [to preempt state law] in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.

Id. at 168. Under respondents' position, however, state substantive law is *not* preempted; only state enforcement power is displaced. Because state substantive law survives, the public is entitled to expect enforcement of that law, and will naturally expect such enforcement to come from state officials, not a federal administrator. If OCC were to possess exclusive authority to enforce state laws through its often confidential processes, and if the agency were to decline to enforce that law or to do a poor job of enforcing it – whether due to lack of resources, lack of familiarity with the law, different enforcement priorities, or any other reason – the public would likely blame state officials for those failures. It is not clear that Congress could ever enact such a regime, but before accepting a statutory construction that so confuses the traditional roles of federal and state authority and diminishes political accountability within our federalist system, this Court should at least require explicit evidence that Congress intended that reading. *See New York*, 505 U.S. at 170 (applying the *Gregory* clear-statement rule to avoid statutory interpretation that would erode political accountability).

2. Moreover, a clear indication that Congress intended to preempt all state enforcement of valid state law would be required even if the Regulation were not considered especially destructive to the balance of

federal and state authority or intrusive on state sovereignty. All preemption threatens the balance of federal and state authority. This Court recently reaffirmed that every express or implied preemption analysis begins "'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Altria, Inc. v. Good*, 555 U.S. __, 129 S. Ct. 538, 543 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). This presumption against preemption "applies with particular force when Congress has legislated in a field traditionally occupied by the States." *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Under the presumption, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Id.* (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)). The rule ensures "that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (internal citation and quotation marks omitted).

The court of appeals incorrectly rejected application of the presumption against preemption on the ground that regulation of national banks has been substantially occupied by federal authority for an extended period of time. Pet. App. 12a-13a. In *Altria*, however, this Court made clear that the presumption applies in every case threatening displacement of the States' historic police powers, and merely acquires special force in areas where there has been no substantial federal presence. 129 S. Ct. at 543. In any event, this case is not about

banking regulation, an area where there has been a sustained federal presence as to national banks. It is about the protection of consumers, where States historically have taken the lead. When passing Riegle-Neal, the House Banking, Finance, and Urban Affairs Committee specifically observed that "[c]onsumer protection, fair lending and community reinvestment laws have been areas of traditional State concern." H.R. Rep. No. 103-448, at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2039, 2047. And a later conference report endorsed application of the presumption against preemption regarding those specific areas of regulation. *See* H.R. Conf. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 2074 (approving the judicially established "rule of construction that avoids finding a conflict between the Federal and State law where possible").

The court of appeals misconstrued this Court's decision in *Barnett Bank* to support its conclusion that no presumption against preemption applies here. *See* Pet. App. 12a. *Barnett Bank* involved a national bank's power to sell insurance when expressly authorized by Federal law but prohibited by state law. The case did not disavow the presumption against preemption in all cases involving national banks, and did not consider whether the presumption would apply in the context of consumer protection or civil rights laws. *See* Bagley, *supra*, at 2300-02. In this context, the presumption against preemption applies, and requires § 484(a) to be construed in a manner that limits the statute's intrusion on state authority.

Because the Regulation triggers the above canons requiring a clear indication of *congressional* intent, and

because no such clear statement exists in § 484, the agency's interpretation cannot be sustained under *Chevron*. This Court has squarely held that when an agency purports to adopt a statutory interpretation that raises serious constitutional questions and thus implicates the doctrine of constitutional avoidance, the interpretation will not receive *Chevron* deference. *See Solid Waste Agency of N. Cook County* ("*SWANCC*"), 531 U.S. 159, 172-73 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988). That is because "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority," especially "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172. Because it is likewise implausible that Congress intended that OCC should have the ability to disrupt the federal-state balance so dramatically as its Regulation proposes, OCC's interpretation should not receive *Chevron* deference.

B. The Regulation Is Not Eligible for *Chevron* Deference Because It Declares the Preemptive Scope of a Federal Statute.

Apart from any clear-statement canon, the Regulation is not eligible for *Chevron* deference because it declares the preemptive scope of a federal statute. This Court has never deferred to a regulation of this nature, and it should not do so here.

1. *Chevron* rests on a presumption about relative institutional competence: Because administrative agencies are more expert than the courts in implementing the details of complex and technical regulatory schemes, the courts presume that Congress intended them to defer to authorized agencies' policy judgments in resolving statutory ambiguities to implement such schemes. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990). But agencies' very focus on the details of particular regulatory programs makes them ill-suited to resolve the broad structural questions of federalism that preemption cases present. *See, e.g.*, Nina A. Mendelson, *Chevron and Preemption*, 102 Mich. L. Rev. 737, 779-80 (2004); Bagley, *supra*, at 2293-97. When Congress has not spoken clearly on an issue of statutory preemption, leaving resolution of the issue to administrative agencies, subject only to *Chevron* review, would eviscerate the courts' traditional role in maintaining the constitutional balance of federal and state authority. *See United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (identifying "the whole jurisprudence of pre-emption" as an important way in which "this Court has participated in maintaining the federal balance"). Thus, as the dissenting justices in *Watters* observed, without contradiction from the majority, "when an agency purports to decide the scope of federal pre-emption, a healthy respect for state sovereignty calls for something less than *Chevron* deference." 550 U.S. at 41 (Stevens, J. dissenting, joined by Roberts, C.J., and Scalia, J.).

Moreover, the framework for addressing the above federalism concerns is defined by judicially developed

doctrines governing preemption analysis, which courts – not agencies – are most expert in applying. *Cf. Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 642 n.11 (2007) ("Agencies have no special claim to deference in their interpretation of [the Court's] decisions."); *accord Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000). The House Conference Report in Riegle-Neal illustrates this point, expressly contemplating that preemption analysis under the NBA should adhere to "well-established judicial principles." H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. at 2074. And as the court of appeals found "troublesome" below, OCC's rulemaking here is dominated by traditional legal analysis, "consist[ing] almost entirely of the agency's interpretation of case law, legislative history, and statutory text." Pet. App. 25a; *see also id.* ("[T]he OCC does not appear to have any facts at all in promulgating its visitorial powers regulation."). There is no reason why this Court should defer to OCC's legal conclusions about preemption.

A further factor counseling against *Chevron* deference is the strong agency self-interest that often operates in this area. By finding state authority broadly displaced, administrative agencies may effectively increase their own regulatory power, despite the bedrock principle that "[a]n agency may not confer power upon itself." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). To be sure, this Court has been unwilling to deny *Chevron* deference on the sole ground that an agency determination addresses the scope of its own authority, largely because it may be difficult in some case to distinguishing between jurisdictional and non-jurisdictional issues. *Compare Miss. Power & Light Co.*

v. Mississippi ex rel. Moore, 487 U.S. 354, 381-82 (1988) (Scalia, J., concurring in judgment), *with id.* at 386-87 (Brennan, J., dissenting). But preemption questions are easily identified, and, in any event, petitioner does not advance the point as a sufficient reason, by itself, to deny *Chevron* deference. Rather, it is an additional reason for concern that agencies will not give adequate consideration to the federalism implications of a decision to oust state authority.

That risk is particularly acute with respect to OCC, since federal and state banking regulators essentially compete to attract institutions to incorporate under their respective charters. OCC's budget is funded almost entirely from assessments levied against the banks it supervises,[20] which creates strong incentives for the agency to make a federal charter more attractive to banks. In this regard, former Comptroller John Hawke openly stated in 2000 that preemption of state law "is one of the advantages of a national charter," and acknowledged that OCC is "not the least bit ashamed to promote it."[21] It would give short shrift to federalism

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20. *See* Office of the Comptroller of the Currency, U.S. Dep't of Treasury, *Annual Report: Fiscal Year 2007*, at 7, *available at* http://www.occ.treas.gov/annrpt/2007AnnualReport.pdf (last visited February 24, 2009). The private source of the agency's budget also diminishes the agency's political accountability. The Comptroller has cited the assessment system, together with the fact that he is appointed by the President for a fixed term of five years, as evidence of its "considerable operational independence." *Id.*

21. *See* Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers – Dependent on Lenders' Fees, the OCC Takes Their Side Against Local, State Laws*, Wall St. J., Jan. 28, 2002, at A1.

values for courts to defer under *Chevron* to OCC's efforts to broadly displace state enforcement against national banks, rather than independently evaluating the appropriateness of such preemption under established legal principles.

In short, declarations about the preemptive scope of a federal statute differ sharply from substantive statutory interpretations, and it is unlikely that Congress would intend that administrative agencies possess primary interpretive authority in the area of preemption. Thus, while this Court has often deferred to agency interpretations of the substantive meaning of federal statutes, including OCC's substantive interpretations of the NBA, *see, e.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 737, 743-44 (1996); *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-58 (1995), the Court has not deferred to agency actions that merely purport to declare the preemptive scope of a federal statute, and has questioned the application of such deference, *see Smiley*, 517 U.S. at 744 (assum[ing] (without deciding) that the [preemptive meaning of a statute] must always be decided *de novo* by the courts"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) (the Court's interpretation of statutory express preemption clause merely "substantially informed by" agency's regulation); *see also id.* at 512 (O'Connor, J., concurring in part and dissenting in part) ("It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference."). Because OCC's regulation purports to declare the scope of

preemption effected by § 484, it is not eligible for *Chevron* deference.[22]

2. At a minimum, the above considerations counsel for applying heightened scrutiny before concluding that Congress has delegated to an agency rulemaking authority to declare the scope of statutory preemption. *See Gonzales*, 546 U.S. at 258 (reiterating that, as a precondition to *Chevron* deference, a regulation "must be promulgated pursuant to authority Congress has delegated to the [agency]"). As the *Watters* dissenters recognized, "there is a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation." 550 U.S. at 39 (Stevens, J., dissenting). Accordingly, this Court should not apply *Chevron* to an agency declaration about preemption absent specific evidence that Congress intended that the agency would possess primary interpretive authority regarding the scope of statutory preemption.[23]

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22. This analysis does not "touch [the Court's] cases holding that a properly promulgated agency regulation can have a preemptive *effect* should it conflict with state law." *Watters*, 550 U.S. at 40 n.24 (Stevens, J., dissenting) (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154-59 (1982); *City of N.Y. v. FCC*, 486 U.S. 57, 59, 65-70 (1988)). *See also United States v. Shimer*, 367 U.S. 374, 381-85 (1961). It is a different matter when agencies merely declare the preemptive scope of a federal statute, particularly where the agency's declaration is unconnected to any substantive regulation.

23. On occasion, Congress has expressly and specifically delegated to an agency the authority to determine preemption (Cont'd)

There is no such specific evidence here. The principal delegation of rulemaking authority to OCC, 12 U.S.C. § 93a, merely provides generally that "the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office." Congress has not specifically conferred on OCC any power to determine the preemptive scope of § 484(a).

Nor does the Regulation "carry out the responsibilities of the office" of the Comptroller, under the natural meaning of that language. OCC supervises national banks by monitoring their fiscal soundness and enforcing the NBA's banking laws. Accordingly, this Court has held that the Comptroller "is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these

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(Cont'd)

questions. *See, e.g.*, 30 U.S.C. § 1254(g) (preempting state or local statutes that conflict with "the purposes and the requirements of this Act" and providing that "[t]he Secretary [of the Interior] shall set forth any State law or regulation which is preempted and superseded by the Federal program"); 47 U.S.C. § 253(a), (d) (authorizing the Federal Communications Commission to preempt "any statute, regulation, or legal requirement" that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"); 49 U.S.C. § 5125(d) (setting forth a procedure by which an affected person may apply to the Secretary of Transportation for a decision as to whether a state or local statute that conflicts with the regulation of hazardous waste transportation is preempted, or may seek relief from a court of competent jurisdiction).

laws." *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403-04 (1987). But displacement of state enforcement authority is a different matter entirely. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (delegation of authority to promulgate motor vehicle safety "standards" did not include the authority to determine whether a statutory private right of action was barred because "[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute"). OCC's Regulation does not address any statutory provision that the agency is charged to enforce, and OCC's rulemaking does not mention safety or soundness or explain any way in which state enforcement of valid state laws purportedly impairs OCC's own supervisory functions. Thus, the regulation does not carry out OCC's statutory responsibilities.

To be sure, the 1994 Riegle-Neal amendments recognized that OCC had been issuing opinion letters and interpretive rules on preemption. *See* 12 U.S.C. § 43. But by its own terms, § 43 did not confer any authority on OCC to make binding determinations concerning statutory preemption,[24] but rather placed limitations on OCC's existing practice. *See Watters*, 550 U.S. at 39 n.22 (Stevens, J., dissenting).

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24. OCC arguably has such authority in an extremely narrow area not at issue here: determining whether "the application of [state consumer protection, fair-lending, community reinvestment, and intrastate branching laws] would have a discriminatory effect" on the national bank branch in comparison with their effect of the branches of a bank chartered by the host State. 12 U.S.C. § 36(f)(1)(A)(ii). Although OCC's expertise may be relevant to the determination at issue in § 36, it has no bearing on the interpretive question in this case.

Section 43(a) requires OCC to follow notice-and-comment procedures before issuing "any opinion letter or interpretive rule that concludes that Federal law preempts the application to a national bank of any State law regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches." The reference to "opinion letter[s] or interpretive rule[s]" is particularly significant, since those types of administrative actions do not have the force of law and generally are not eligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000).

Moreover, the Riegle-Neal House Conference Report confirms that § 43 was "not intended to confer upon the agency any new authority to preempt or determine preemptive Congressional intent . . . , or to change the substantive theories of preemption as set forth in existing law." H.R. Conf. Rep. No. 103-651, at 55, *reprinted in* 1994 U.S.C.C.A.N. at 2076. Rather, the section was intended "to help focus any administrative preemption analysis" by OCC, given that OCC had been "appl[ying] traditional preemption principles" in an "inappropriately aggressive" manner. *Id.* at 53, 55, *reprinted in* 1994 U.S.C.C.A.N. at 2074, 2076. Congress therefore clearly did not intend § 43 to delegate to OCC any additional rulemaking authority concerning preemption.

Of course, even if not eligible for *Chevron* deference, OCC's views may be given respect in proportion to their power to persuade under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Mead*, 533 U.S. at 235 (stating

that agency action not eligible for *Chevron* should be considered under *Skidmore*); *cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Lohr*, 518 U.S. at 495. But that is of no help to OCC, since the agency's rulemaking breaks sharply from its own prior interpretations in a manner that drastically alters the federal-state balance, and does so based not on any technical analysis about the business of banking, but on legal arguments that are demonstrably incorrect. See Point I, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

APPENDIX — RELEVANT STATUTORY PROVISIONS

New York Executive Law § 63(12)

§ 63. General duties

* * *

12. Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any

separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

New York Executive Law § 296-a

§ 296-a. Unlawful discriminatory practices in relation to credit

1. It shall be an unlawful discriminatory practice for any creditor or any officer, agent or employee thereof:

a. In the case of applications for credit with respect to the purchase, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation, land or commercial space to discriminate against any such applicant because of the race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status of such applicant or applicants or any member, stockholder, director, officer or employee of such applicant or applicants, or of the prospective occupants or tenants of such housing accommodation, land or commercial space, in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any such credit;

b. To discriminate in the granting, withholding, extending or renewing, or in the fixing of the rates, terms or conditions of, any form of credit, on the basis of race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status;

c. To use any form of application for credit or use or make any record or inquiry which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, disability, or familial status;

d. To make any inquiry of an applicant concerning his or her capacity to reproduce, or his or her use or advocacy of any form of birth control or family planning;

e. To refuse to consider sources of an applicant's income or to subject an applicant's income to discounting, in whole or in part, because of an applicant's race, creed, color, national origin, sexual orientation, military status, age, sex, marital status, childbearing potential, disability, or familial status;

f. To discriminate against a married person because such person neither uses nor is known by the surname of his or her spouse.

This paragraph shall not apply to any situation where the use of a surname would constitute or result in a criminal act.

2. Without limiting the generality of subdivision one of this section, it shall be considered discriminatory if, because of an applicant's or class of applicants' race, creed, color, national origin, sexual orientation, military status, age, sex, marital status or disability, or familial status, (i) an applicant or class of applicants is denied credit in circumstances where other applicants of like overall credit worthiness are granted credit, or (ii) special requirements or conditions, such as requiring co-obligors or reapplication upon marriage, are imposed upon an applicant or class of applicants in circumstances where similar requirements or conditions are not imposed upon other applicants of like overall credit worthiness.

3. It shall not be considered discriminatory if credit differentiations or decisions are based upon factually supportable, objective differences in applicants' overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history of such applicants, as well as reference to any other relevant factually supportable data; provided, however, that no creditor shall consider, in evaluating the credit worthiness of an applicant, aggregate statistics or assumptions relating to race, creed, color, national origin, sexual orientation, military status, sex, marital status or disability, or to the likelihood of any group of persons bearing or rearing children, or for that reason receiving diminished or interrupted income in the future.

3-a. It shall not be an unlawful discriminatory practice to consider age in determining credit worthiness when age has a demonstrable and statistically sound relationship to a determination of credit worthiness.

4. a. If so requested by an applicant for credit, a creditor shall furnish such applicant with a statement of the specific reasons for rejection of the applicant's application for credit.

b. If so requested in writing by an individual who is or was married, a creditor or credit reporting bureau shall maintain in its records a separate credit history for any such individual. Such separate history shall include all obligations as to which such bureau has notice with respect to which any such person is or was individually or jointly liable.

5. No provision of this section providing spouses the right to separately apply for credit, borrow money, or have separate credit histories maintained shall limit or foreclose the right of creditors, under any other provision of law, to hold one spouse legally liable for debts incurred by the other.

6. Any person claiming to be aggrieved by an unlawful discriminatory practice engaged in by a regulated creditor, in lieu of the procedure set forth in section two hundred ninety-seven of this [fig 1] article, may file a verified complaint with the superintendent, as provided hereinafter; provided, however, that the filing of a complaint with either the superintendent or the division

shall bar subsequent recourse to the other agency, as well as to any local commission on human rights, with respect to the grievance complained of.

7. In the case of a verified complaint filed with the superintendent the following procedures shall be followed:

a. After receipt of the complaint, the superintendent shall make a determination within thirty days of whether there is probable cause to believe that the person named in the complaint has engaged in or is engaging in an unlawful discriminatory practice. If the superintendent determines there is no such probable cause, the complaint shall be dismissed. If the superintendent determines that there is such probable cause, he or she shall attempt to resolve such complaint by conference and conciliation. If conciliation is achieved, the terms shall be recorded in a written agreement signed by the creditor and complainant, a copy of which shall be forwarded to the commissioner.

b. If conciliation is not achieved, the superintendent or his or her designated representative shall conduct a hearing with respect to the alleged violation of this section. All interested parties shall be entitled to adequate and timely notice of the hearing. Such parties shall have the right to be represented by counsel or by other representatives of their own choosing; to offer evidence and witnesses in their own behalf and to cross-examine other parties and witnesses; to have the power of subpoena exercised in their behalf; and to have access

to a written record of such hearing. The superintendent or his or her representative shall not be bound by the strict rules of evidence prevailing in courts of law or equity. The testimony taken shall be under oath and a record shall be made of the proceedings. A written decision shall be made by the superintendent or his or her designated representative separately setting forth findings of fact and conclusions of law. A copy of such decision shall be forwarded to the commissioner.

c. If the superintendent finds that a violation of this section has occurred, the superintendent shall issue an order which shall do one or more of the following:

(1) impose a fine in an amount not to exceed ten thousand dollars for each violation, to be paid to the people of the state of New York;

(2) award compensatory damages to the person aggrieved by such violation;

(3) require the regulated creditor to cease and desist from such unlawful discriminatory practices;

(4) require the regulated creditor to take such further affirmative action as will effectuate the purposes of this section, including, but not limited to, granting the credit which was the subject of the complaint.

d. Any complainant, respondent or other person aggrieved by any order or final determination of the superintendent may obtain judicial review thereof.

8. Where the superintendent makes a determination that a regulated creditor has engaged in or is engaging in discriminatory practices, the superintendent is empowered to issue appropriate orders to such creditor pursuant to the banking law. Such orders may be issued without the necessity of a complaint being filed by an aggrieved person.

9. Whenever any creditor makes application to the superintendent or the banking board to take any action requiring consideration by the superintendent or such board of the public interest and the needs and convenience thereof, or requiring a finding that the financial responsibility, experience, charter, and general fitness of the applicant, and of the members thereof if the applicant be a co-partnership or association, and of the officers and directors thereof if the applicant be a corporation, are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently, such creditor shall certify to the superintendent compliance with the provisions of this section. In the event that the records of the banking department show that such creditor has been found to be in violation of this section, such creditor shall describe what action has been taken with respect to its credit policies and procedures to remedy such violation or violations. The superintendent shall, in approving the foregoing applications and making the foregoing findings, give appropriate weight to compliance with this section.

10. Any complaint filed with the superintendent pursuant to this section shall be so filed within one year after the occurrence of the alleged unlawful discriminatory practice.

Appendix

11. The superintendent is hereby empowered to promulgate rules and regulations hereunder to effectuate the purposes of this section.

12. The provisions of this section, as they relate to age, shall not apply to persons under the age of eighteen years.

RESPONDENT'S BRIEF

No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, ATTORNEY GENERAL OF NEW YORK, PETITIONER

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the Office of the Comptroller of the Currency (OCC) reasonably interpreted 12 U.S.C. 484(a), which generally precludes governmental actors other than OCC from exercising "any visitorial powers" over national banks, to prohibit the New York Attorney General from demanding national bank records and from filing suit to enforce compliance by national banks with the State's fair lending laws.

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In the Supreme Court of the United States

No. 08-453

ANDREW M. CUOMO, ATTORNEY GENERAL OF NEW YORK, PETITIONER

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 510 F.3d 105. The opinions of the district court (Pet. App. 63a-117a, 118a-142) are reported at 396 F. Supp. 2d 383 and 394 F. Supp. 2d 620.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2007. A petition for rehearing was denied on June 5, 2008 (Pet. App. 143a-144a). On August 26, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 3, 2008. The petition was filed on that date and was granted on January 16, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. The Office of the Comptroller of the Currency (OCC) is responsible for administering the National Bank Act (NBA or Act), 12 U.S.C. 21 *et seq.* OCC's chief officer, the Comptroller of the Currency, is authorized "to prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. 93a. OCC is authorized to initiate enforcement proceedings if it concludes that a national bank is not in compliance with any applicable state or federal law regulating the business of banking. 12 U.S.C. 1818(b).

The NBA was enacted in 1864 to create a national banking system and to protect it from potentially hostile action by the States. *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 412-413 (1874). "To prevent inconsistent or intrusive state regulation from impairing the national system," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007), the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a). An additional exception permits "lawfully authorized State auditors and examiners" to "review [a bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b).[1]

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[1] The NBA's original visitorial exclusivity provision stated that national banks "shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." NBA, ch. 106, § 54, 13 Stat. 116. The current version of Section 484 largely tracks that provision but includes aiditional exceptions to the rule of visitorial exclusivity.

Through notice and comment rulemaking, OCC has promulgated 12 C.F.R. 7.4000, which interprets Section 484. 69 Fed. Reg. 1895 (2004); 68 Fed. Reg. 6363 (2003); 64 Fed. Reg. 60,092 (1999); 64 Fed. Reg. 31,479 (1999). The regulation defines the term "visitorial powers" to include "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2). The regulation also clarifies the meaning of the statutory exception that permits the exercise of visitorial powers "vested in the courts of justice." 12 U.S.C. 484(a). The regulation states that the exception "pertains to the powers inherent in the judiciary," such as the authority to issue discovery orders and subpoenas, "and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." 12 C.F.R. 7.4000(b)(2).

2. Various federal laws prohibit discrimination in lending on the basis of race and other protected grounds. See, *e.g.*, Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*; Fair Housing Act (FH Act), 42 U.S.C. 3601 *et seq.* Many States, including New York, have enacted laws that substantially parallel those federal anti-discrimination provisions. New York Executive Law § 296-a is that State's counterpart to ECOA. Pet. App. 3a & n.3; N.Y. Exec. Law. § 296-a(1) (McKinney 2005).

The Home Mortgage Disclosure Act of 1975 (HMDA), 12 U.S.C. 2801 *et seq.*, requires lenders mak-

ing loans secured by residential real property to compile and make publically available information about their mortgage lending activities. 12 U.S.C. 2803. Required disclosures include applicants' race, ethnicity, gender, and income, and, for certain loans, the interest rate charged. *Ibid.* Because HMDA data do not capture all information necessary for prudent underwriting and pricing, HMDA data alone cannot establish unlawful lending discrimination. 59 Fed. Reg. 18,270 (1994); OCC, *Frequently Asked Questions About the New HMDA Data* 5-6 (Apr. 3, 2006) (*HMDA Data Questions*) <http://www.occ.treas.gov/ftp/release/2006-44a.pdf>. Consideration of additional information—such as credit history scores, borrower debt-to-income ratios, and loan-to-property-value ratios—may indicate that differential pricing or other differential treatment reflects prudent lending practices rather than unlawful conduct. *Ibid.*

In order to determine whether a bank has engaged in unlawful discrimination in its lending activities, OCC employs a program involving fair lending risk assessment, risk screening using sophisticated modeling techniques, and on-site examinations. If OCC determines that a bank has violated fair lending laws or that its practices are potentially discriminatory, OCC will order the bank to cease the discriminatory practices, take necessary remedial action to redress harm to borrowers, and make referrals to the United States Department of Justice and notifications to the Department of Housing and Urban Development, as appropriate. 15 U.S.C. 1691e(g) and (k); 59 Fed. Reg. at 18,272-18,274; OCC, *Fair Lending Examination Procedures* 9 (Apr. 2006).

3. In March 2005, four national banks that are members of the Clearing House Association, a trade association of financial institutions, disclosed HMDA data for 2004. Shortly thereafter, the New York State Attorney General's office sent "letters of inquiry" to the banks. Pet. App. 3a. The letters asserted that the HMDA data indicated racial disparities in loan pricing between white borrowers and African-American and Hispanic borrowers. *Ibid.* The letters further stated that the disparities, "unless legally justified[,] may violate federal and state anti-discrimination laws such as [ECOA] and its state counterpart, New York State Executive Law § 296-a." *Ibid.* "In lieu of issuing a formal subpoena," the letters requested certain non-public information concerning the banks' lending activities, including data on real estate loans made in the State. *Id.* at 3a-4a. The Attorney General's office claimed authority to demand the requested bank records under New York Executive Law § 63(12), which empowers the Attorney General to issue civil subpoenas. Pet. App. 69a.

In June 2005, respondents (OCC and the Clearing House Association) each filed a complaint in federal district court seeking declaratory and injunctive relief against petitioner, the New York State Attorney General. Respondents contended that petitioner's demand for bank records and his threatened enforcement actions constituted a prohibited exercise of visitorial powers over national banks. Pet. App. 4a-5a, 66a-67a. Petitioner filed a counterclaim in the OCC action seeking to have OCC's visitorial powers regulation declared arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. 706. Pet. App. 5a.

The district court entered summary judgment for respondents. The court granted declaratory and injunctive relief that barred petitioner from demanding to inspect the national banks' books and records in connection with his investigation and from initiating any judicial action against national banks to enforce the State's fair lending laws. Pet. App. 63a-117a, 118a-142a. The court also denied petitioner's counterclaim challenging the validity of OCC's regulation. *Id.* at 114a-115a.

4. As relevant here, the court of appeals affirmed the district court's judgment. Pet. App. 1a-62a. The court of appeals observed that the parties' dispute centered on "the meaning of the term 'visitorial powers' in § 484(a)," and, in particular, on whether OCC's regulatory interpretation of that term is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 10a. In that regard, the court noted petitioner's concession that, if OCC's definition of the term "visitorial powers" and its construction of the "courts of justice" exception were upheld, Section 484(a) would bar petitioner's investigation and threatened enforcement actions. *Id.* at 15a & n.6.

The court of appeals then considered and rejected petitioner's various arguments that *Chevron* deference should not apply. The court first rejected the contention that *Chevron* deference would be inconsistent with the presumption against preemption that governs in areas of regulation traditionally allocated to the States. The court explained that the presumption does not apply in the context of national bank regulation, which has been "substantially occupied by federal authority for an extended period of time." Pet. App. 12a (citation omitted).

The court of appeals also dismissed petitioner's contention that *Chevron* deference is inappropriate because OCC's interpretation of the term "visitorial powers" invokes the outer limits of Congress's power and therefore triggers the doctrine of constitutional avoidance. Pet. App. 13a-14a. The court concluded that OCC's construction of the disputed statutory language raises no constitutional concerns even though it prevents the States from enforcing certain state laws against national banks. The court observed that national banks are "creatures of federal statute" and that States "can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Id.* at 14a (quoting *Farmers' & Mechs'. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875)). The court also rejected petitioner's argument that OCC had exceeded its rulemaking authority, explaining that 12 U.S.C. 93a gives OCC "broad authority" to promulgate regulations implementing the NBA. Pet. App. 24a.

Applying *Chevron* deference, the court of appeals held that OCC's regulation reflects a reasonable understanding of the term "visitorial powers" and the "courts of justice" exception. The court concluded that OCC's interpretation of "visitorial powers" is consistent with the definition this Court gave that term in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905), and is supported by *Watters*, which made clear that "investigation and enforcement by state officials are just as much aspects of visitorial authority as registration and other forms of administrative supervision." Pet. App. 20a.

The court of appeals also concluded that OCC had reasonably construed the "courts of justice" exception as involving only "the powers inherent in the judiciary" and not as granting authority to States to "compel com-

pliance by a national bank" with any law concerning "the content or conduct of activities authorized for national banks under Federal law." Pet. App. 30a (quoting 12 C.F.R. 7.4000(b)(2)). The court noted that petitioner's proposed interpretation of the exception, under which States could use lawsuits to enforce regulations that could not be enforced administratively, "would swallow the rule" against the unauthorized exercise of "visitorial powers." *Ibid.*

The court of appeals concluded that, "[i]n drawing the lines that it did in § 7.4000(a), the OCC reached a permissible accommodation of conflicting policies that were committed to it by the statute." Pet. App. 28a. The court explained that OCC's approach "furthers Congress's intent * * * to shield national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers, such as real estate lending." *Id.* at 28a-29a (quoting *Watters*, 550 U.S. at 11). "At the same time," the court observed, the challenged OCC regulation "preserves state sovereignty by leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers." *Id.* at 29a.

Judge Cardamone dissented in relevant part. Pet. App. 42a-62a. He would have held that OCC's regulatory definition of the term "visitorial powers" is not entitled to *Chevron* deference and that OCC's regulation is invalid because it impermissibly alters the balance between federal and state authority. *Ibid.*

SUMMARY OF ARGUMENT

The NBA prohibits governmental officials other than OCC from exercising "any visitorial powers" over national banks, except in limited circumstances authorized by federal law. 12 U.S.C. 484(a). The court of appeals correctly upheld OCC's regulation defining the term "visitorial powers" to include state efforts to obtain national bank records and to enforce state fair lending laws against national banks.

A. OCC's regulation is entitled to *Chevron* deference. This Court has repeatedly deferred to OCC interpretations of ambiguous terms in the NBA. See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.* 517 U.S. 735 (1996). The regulation at issue here was adopted, after full notice-and-comment procedures, under OCC's broad authority to promulgate regulations administering the NBA, 12 U.S.C. 93a.

B. Petitioner identifies no sound basis for withholding *Chevron* deference in this case. OCC's regulation does not alter the federal-state balance but simply precludes state enforcement of laws that regulate the performance by federal instrumentalities of their federally authorized powers. For similar reasons, no presumption against preemption applies to the regulation of national banks, as to which federal authority has always been predominant.

OCC's regulation does not declare the preemptive scope of the NBA, but identifies the circumstances under which state officials may act to enforce non-preempted state-law provisions. The Court in *Smiley* deferred to OCC's interpretation of ambiguous language in the NBA even though the practical effect of that interpretation was to preclude the application of state laws that would have been valid under a different con-

struction of the NBA. 517 U.S. at 743-744. And, even if OCC's regulation were read as determining the scope of federal preemption, it would be entitled to deference. See, *e.g.*, *City of N.Y.* v. *FCC*, 486 U.S. 57, 63-64 (1988); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153-154 (1982).

OCC clearly had authority to issue regulations interpreting Section 484. Section 484 is contained within a statute that OCC administers, and it addresses the circumstances under which national banks can be subject to supervisory and enforcement activities. OCC has consistently understood "visitorial powers" to encompass state efforts to examine national banks, review their books and records, and enforce all applicable laws that regulate the business of banking.

C. OCC's interpretation of the term "visitorial powers" better reflects the NBA's text, structure, and purposes than petitioner's alternative view that the term is limited to supervisory oversight of a bank's internal management, safety and soundness, and charter compliance. When the NBA was enacted, the visitorial powers of the States over civil corporations included broad supervisory authority to protect the public and to police corporate compliance with public laws. States frequently exercised that authority through judicial actions brought by their attorneys general, and visitorial powers over banks were particularly broad.

OCC's interpretation is also supported by the exceptions to Section 484's general prohibition. Those exceptions confirm that "visitorial powers" are not limited to supervision of internal bank affairs and charter compliance, but include state review of bank records to ensure the bank's compliance with more general laws, such as unclaimed property and escheat laws and state tax laws.

OCC's interpretation also furthers the purposes of the NBA, which created the national banking system during the Civil War to further important goals of the federal government, and which carefully protected national banks from potentially hostile action by the States. Even when the application to national banks of state law is not substantively preempted, differences in interpretation, enforcement priorities, or choice of remedies can interfere with uniform bank supervision and with the exercise by national banks of their federally authorized powers.

OCC's interpretation is also supported by this Court's decisions in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905), and *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007), which reflect the Court's own understanding of the NBA term "visitorial powers." Indeed, in *Watters*, this Court concluded that Michigan laws authorizing virtually the same enforcement actions that petitioner sought to take here involved the exercise of "visitorial powers." *Id.* at 13-15. OCC's interpretation is further supported by other provisions of federal banking law that explicitly address the appropriate entity for enforcing state fair lending laws against national banks. 12 U.S.C. 36(f)(1)(B).

D. Petitioner's alternative construction—that the term "visitorial powers" is unambiguously limited to supervisory oversight of a bank's safety and soundness, internal organization, and charter compliance—cannot be squared with the NBA's text, structure, and purposes, or with this Court's precedent. Petitioner's argument rests on a false dichotomy between "supervisory oversight" of a national bank's safety and soundness and charter compliance, on the one hand, and enforcement of "generally applicable" laws on the other. Although

New York's fair lending law is not designed specifically to ensure the safety and soundness of regulated banks, it is directed at core banking activities, and enforcement of the law necessarily entails judgments about safe and sound lending practices. OCC's interpretation of Section 484, under which state officials are barred from enforcing laws of that character, does not disable the States from enforcing laws of true general applicability, such as employment-discrimination and other labor laws.

Petitioner's interpretation is not supported by *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), or by any of the other decisions of this Court on which petitioner relies. None of those decisions mentions, much less construes, Section 484, its predecessor provisions, or the term "visitorial powers," and none of them suggests that petitioner has the power to take the investigative and enforcement actions that he threatened in this case.

Petitioner is also mistaken in contending that OCC's interpretation would have left a significant gap in enforcement authority between 1864, when the NBA was enacted, and 1966, when Congress gave OCC authority to issue cease-and-desist orders to enforce state law. Since the NBA's enactment, OCC has been authorized to investigate whether national banks are complying with applicable state laws and to use its informal supervisory authority to ensure their compliance. In addition, private parties injured by a national bank's violation of applicable state law have always been able to seek redress in the courts. OCC currently has formal authority to enforce compliance with both state and federal fair lending laws. And OCC vigorously examines for, and enforces compliance with, fair lending requirements.

ARGUMENT

OCC'S INTERPRETATION OF THE TERM "VISITORIAL POWERS" IS SUPPORTED BY THE TEXT, STRUCTURE, AND PURPOSES OF THE NATIONAL BANK ACT AND IS ENTITLED TO *CHEVRON* DEFERENCE

The NBA was enacted during the Civil War to create a nationwide banking system, independent of the States and shielded from potentially hostile state actions, in order to establish a national currency and promote a strong national economy. *Talbott* v. *Silver Bow County*, 139 U.S. 438, 442-443 (1891); *Tiffany* v. *National Bank*, 85 U.S. (18 Wall.) 409, 412-413 (1874). As instrumentalities of the federal government, federally chartered and created for a public purpose, national banks have always been subject to the paramount authority of the United States. *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). Thus, from its enactment, the NBA has reflected the principle that "the States can exercise no control over" national banks "except insofar as Congress may see proper to permit." *Farmers' & Mechs'. Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875).

The central question in this case is whether state officials may investigate and enforce compliance by national banks with state laws that regulate their federally authorized banking activities. The NBA addresses that question in its "visitorial powers" provision, which is designed "[t]o prevent inconsistent or intrusive state regulation from impairing the national [banking] system." *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007). That provision states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by

Congress or by either House thereof or by any committee of Congress or of either House duly authorized." 12 U.S.C. 484(a). The provision contains an additional exception that allows "lawfully authorized State auditors and examiners" to "review [a bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b).

OCC has promulgated a regulation that construes the term "visitorial powers" to include state efforts to inspect national bank records and to enforce compliance by national banks with applicable laws concerning federally authorized banking activities. 12 C.F.R. 7.4000(a)(2). Relying on that interpretation, the district court enjoined petitioner from demanding national bank lending records or instituting judicial actions to enforce state fair lending laws against national banks. J.A. 206a-207a, 209a. The court of appeals correctly upheld that injunction and OCC's regulation. OCC's interpretation of the term "visitorial powers" is entitled to judicial deference and is amply supported by the text, structure, and purposes of the NBA.

A. Under *Chevron*, OCC's Regulatory Definition Of The Term "Visitorial Powers" Is Controlling If It Is Reasonable

OCC's regulation defines "visitorial powers" to include "(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities." 12 C.F.R. 7.4000(a)(2). Under OCC's interpretation, unless an exception applies, Section 484 prohibits state officials from demanding national bank

records or enforcing compliance by national banks with state laws regulating their federally authorized banking activities, such as real estate lending.

Contrary to petitioner's contention (Br. 19-20), however, OCC's regulation does not equate "visitorial powers" with "general law enforcement." Under OCC's interpretation, "visitorial powers" include two principal state activities. First, the term encompasses all state efforts to examine a national bank or inspect its records. 12 C.F.R. 7.4000(a)(2)(i) and (ii). Second, the term includes state regulatory or enforcement activities of a particular kind—those directed at an institution's banking activities. 12 C.F.R. 7.4000(a)(2)(iii) and (iv). The term does not encompass every state effort to enforce *any* state law against a national bank, but rather is limited to enforcement of laws "concerning" "activities authorized or permitted pursuant to federal banking law." *Ibid.* Thus, States remain free to enforce applicable laws that do not regulate the content or conduct of federally authorized banking activities, 12 C.F.R. 7.4000(a)(3), including, for example, criminal, tax, zoning, and labor and employment laws. See 69 Fed. Reg. 1896 (2004).[2]

Under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), OCC's regulation interpreting "visitorial powers" is entitled to controlling weight if it is reasonable. As

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[2] Although OCC's regulation defines "visitorial powers" to encompass a state officer's demand to examine a national bank or inspect its records even if the purpose of that demand is unrelated to the business of banking, this case does not present any question concerning the application of Section 484 and the regulation to a demand of that character. The avowed purpose of petitioner's "letters of inquiry" was to obtain information concerning national banks' federally authorized lending activities. Pet. App. 3a-4a.

this Court recognized in *Chevron*, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Id.* at 843 (citation omitted). Accordingly, when a statute authorizes an agency to engage in rulemaking, courts assume that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute" through the rulemaking process. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). In that circumstance, a reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Ibid.*

Because OCC is "the administrator charged with supervision of the [NBA]," this Court has repeatedly applied *Chevron* deference to OCC's interpretations of ambiguous provisions in the Act. *NationsBank* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995) (citing *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987), and *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-627 (1971)). Indeed, the Court has stated that the Comptroller's special authority to administer the NBA warrants deference to his interpretations even when they are not adopted through notice-and-comment rulemaking or formal adjudication. *Mead Corp.*, 533 U.S. at 230-231 & n.13 (citing *NationsBank*, *supra*). In this case, OCC's interpretation of the relevant NBA provision is set forth in a published regulation that was promulgated after full notice-and-comment procedures. 69 Fed. Reg. 1895 (2004); 68 Fed. Reg. 6363 (2003); 64 Fed. Reg. 60,092 (1999); 64 Fed. Reg. 31,749 (1999). The regulation was issued pursuant to the Comptroller's broad

authority to prescribe rules and regulations to "carry out the responsibilities of the office," 12 U.S.C. 93a, which include administration of the NBA and other federal banking laws. *NationsBank*, 513 U.S. at 256. Accordingly, OCC's interpretation of the term "visitorial powers" is controlling if it is reasonable.

B. Petitioner's Arguments Against Applying *Chevron* Deference Are Not Persuasive

1. OCC's regulation does not alter the federal-state balance

Petitioner (Br. 43-45) contends that OCC's regulation is not entitled to *Chevron* deference because it produces a "major alteration in the federal-state balance of authority." Pet. Br. 43. Far from altering the traditional allocation of responsibilities between the federal and state governments, the regulation is consistent with this Court's repeated statements that national banks are created by the government to serve federal purposes and that oversight of the banks is therefore principally entrusted to the United States.

"Nearly two hundred years ago, in *McCulloch* v. *Maryland*, [17 U.S. 316,] 4 Wheat. 316 (1819), this Court held federal law supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10. "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." *Davis*, 161 U.S. at 283. As this Court has repeatedly recognized, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Watters*, 550 U.S. at 11 (quoting *Farmers' & Mechs' Nat'l Bank*, 91 U.S. at 34). Interpreting Section

484 to preclude state enforcement of laws concerning "activities authorized or permitted pursuant to federal banking law" (12 C.F.R. 7.4000(a)(2)(iii)) therefore simply reserves to the federal government its traditional responsibility for the enforcement of laws that regulate the performance by federal instrumentalities of their federally authorized activities.

Petitioner's reliance (Br. 43-45) on *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), is misplaced. Those decisions held that the Tenth Amendment precludes the federal government from "compel[ling] the States to enact or administer a federal regulatory program." *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 188). Precluding States from enforcing their fair lending laws against national banks does not "compel[] state officers to execute federal laws," *id.* at 905, but reserves enforcement of laws affecting federally authorized activities of federally created entities to the federal officials responsible for their supervision.

As this Court reaffirmed in *Watters*, federal displacement of state law over national banks poses no Tenth Amendment concerns. "Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses." 550 U.S. at 22 (citing *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 58 (2003)). "The Tenth Amendment, therefore, is not implicated." *Ibid.*

2. Chevron *deference applies even though Section 484 limits the enforcement authority of state officials rather than addressing the conduct of regulated national banks*

Petitioner (Br. 46-53) makes several related arguments that *Chevron* deference does not apply here because Section 484 preempts state law. Those arguments lack merit.

a. Petitioner argues (Br. 46-47) that OCC's regulation is not entitled to *Chevron* deference because there is a presumption against preemption of state law. That presumption, however, applies only in "field[s] which the States have traditionally occupied." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (citation omitted). The presumption does not apply to the regulation of national banks and other federal instrumentalities, where federal authority has historically been predominant and the States have not played a significant role. See *ibid.*; *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-348 (2001).[3] Indeed, this Court has recognized that the "grants of both enumerated and incidental 'powers' to national banks" involve a presumption in *favor* of preemption, in that those grants are "not normally limited by, but rather ordinarily pre-empt[], contrary state

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[3] This Court's decisions in *Altria Group, Inc.* v. *Good*, 129 S. Ct. 538 (2008), and *Wyeth* v. *Levine*, No. 06-1249 (Mar. 4, 2009), slip op. 9 n.3, did not alter that established principle. They simply make clear that a history of federal regulation does not render the presumption against preemption inapplicable in fields where state regulation has also historically played a substantial role. Unlike the regulated entities in *Altria* and *Wyeth*, national banks are not simply the subject of longstanding federal regulation. Rather, they are *created* by Congress to serve distinctly federal purposes, and their banking powers have never been the subject of extensive state regulation.

law." *Barnett Bank, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996).

b. In a related vein, petitioner argues (Br. 48-53) that OCC's regulation is not entitled to *Chevron* deference because it "declares the preemptive scope of a federal statute." Br. 48. That argument reflects a misunderstanding of Section 484's purpose and effect. Quite apart from Section 484, if particular state laws impose materially greater limitations on the federally authorized banking activities of national banks than federal law, the NBA preempts those laws under ordinary conflict-preemption principles. As this Court explained in *Watters*, "when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way." 550 U.S. at 12 (citing cases). Section 484 does not speak to the circumstances under which substantive state laws will be preempted, but instead addresses whether and how *non-preempted* state laws applicable to national banks may be *enforced* by state officials.

OCC's regulation interpreting the term "visitorial powers" is thus different from the regulation at issue in *Watters*, the "sole purpose" of which "was to pre-empt state law rather than to implement a statutory command." 550 U.S. at 44 (Stevens, J., dissenting). In *Watters*, the dissenting Justices expressed the view that regulations like the one at issue there, which "purport[] to decide the scope of federal pre-emption," *id.* at 41, are not entitled to *Chevron* deference because they improperly attempt "to transform the preemption question from a judicial inquiry into an administrative *fait accompli*," *id.* at 40 n.24 (citation omitted). That concern is not presented by the regulation at issue here, which does not address the preemption question itself, but

instead construes the meaning of an ambiguous term in an "express command" in the statute that Congress has charged OCC to administer. *Id.* at 14.

In *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Court deferred to OCC's interpretation of the term "interest" in 12 U.S.C. 85, which "authorizes a national bank to charge out-of-state credit-card customers an interest rate allowed by the bank's home State, even when that rate is higher than what is permitted by the States in which the cardholders reside." 517 U.S. at 737. The Court rejected the plaintiff's argument that "the 'presumption against . . . preemption' * * * trumps *Chevron*, and requires a court to make its own interpretation of § 85 that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-744. The Court held that deference was warranted even though the practical effect of OCC's interpretation was to preclude the application of state laws that would have been applicable if Section 85 had been given a different construction.

To be sure, whereas the statutory provision at issue in *Smiley* defined the conduct in which regulated entities (the national banks) could lawfully engage, Section 484 is directed not at the banks themselves but at state and federal officials acting in their governmental capacities. In that sense Section 484, and OCC's regulation construing "visitorial powers," may bear a family resemblance to a preemption provision. But neither Section 484 nor the challenged regulation purports to "immunize" national banks from any state laws that would escape preemption under usual conflict-preemption principles. *Watters*, 550 U.S. at 39 (Stevens, J., dissenting). Thus, even if principles of *Chevron* deference were uniquely inapplicable to federal regulations that define

the preemptive scope of a federal statute, the regulation at issue here does not fall within that category.

c. Even if OCC's "visitorial powers" regulation defined the scope of federal preemption in the way petitioner claims, the regulation would be entitled to judicial deference. "Federal regulations have no less pre-emptive effect than federal statutes." *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). And courts review preemptive regulations under the same deferential standards applicable to other regulations, *i.e.*, "only to determine whether [the agency] has exceeded [its] statutory authority or acted arbitrarily." *Id.* at 154; see *City of N.Y.* v. *FCC*, 486 U.S. 57, 64 (1988). "[I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," the Court will "not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Ibid.* (internal quotation marks and citation omitted); see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-700 (1984); *de la Cuesta*, 458 U.S. at 154.

Petitioner argues (Br. 49-50) that *Chevron* deference should not apply to preemptive regulations because preemption questions do not implicate an agency's expertise. That is incorrect. Federal agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth* v. *Levine*, No. 06-1249 (Mar. 4, 2009), slip op. 20 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 496 (1996); *id.* at 505-506

(Breyer, J., concurring). As administrator of the NBA and supervisor of national banks, OCC is well positioned to determine whether the exercise of concurrent enforcement authority by state officials will assist OCC in its supervision or instead interfere with its responsibilities and with the exercise by national banks of their federally authorized powers.

Petitioner contends (Br. 50-52) that OCC's regulation should not receive *Chevron* deference because OCC has a "self-interest" in expanding its regulatory power, particularly since it is funded by assessments on national banks. As petitioner himself recognizes (Br. 50-51), that argument is difficult to square with this Court's practice of deferring to agency interpretations of the scope of their own jurisdiction. See *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381-382 (1988) (opinion of Scalia, J.). Petitioner does not and could not plausibly contend that OCC's regulation *directly* expands its regulatory authority. OCC has undisputed power to enforce New York's fair lending law against national banks; the question in this case is whether state officials may exercise such power as well. The apparent thrust of petitioner's argument (Br. 51) is that, by "mak[ing] a federal charter more attractive to banks," OCC's interpretation of "visitorial powers" will eventually increase the number of national banks, thus potentially increasing the revenues available to OCC and indirectly expanding the de facto reach of its regulatory influence.

Petitioner cites no decision suggesting that such speculation justifies withholding *Chevron* deference. Moreover, the vast majority of state banking departments also obtain their revenues primarily from the institutions they supervise and have just as much incen-

tive to encourage banks to maintain state charters. Conference of State Bank Supervisors, *A Profile of State Chartered Banking* 140-148 (20th ed. 2004/2005). Thus, to the extent such financial considerations may influence regulatory actions, that prospect only underscores the danger inherent in allowing state officials to exercise enforcement authority over national banks.

3. OCC had statutory authority to promulgate its regulation

Petitioner argues (Br. 53-57) that OCC lacked authority to promulgate its regulation because there is no "specific evidence" that Congress gave OCC "rulemaking authority to declare the scope of statutory preemption." Br. 53. That argument is mistaken for several reasons.

First, as discussed above, the regulation does not declare the scope of statutory preemption. Second, courts do not presume that an agency lacks authority to issue regulations determining the scope of preemption in the absence of "specific evidence" that Congress gave the agency that authority. See *City of N.Y.*, 486 U.S. at 64 (A "pre-emptive regulation's force does not depend on express congressional authorization to displace state law.") (citation omitted). In *New York* v. *FERC*, 535 U.S. 1 (2002), this Court explained that the "presumption against pre-emption" does not apply to the question whether an agency "is acting within the scope of its congressionally delegated authority" in issuing a preemptive regulation. *Id.* at 18. Instead, the Court "must interpret the statute to determine whether Congress has given [the agency] the power to act as it has, and [the Court] do[es] so without any presumption one way or the other." *Ibid.*

Analyzed under that standard, 12 U.S.C. 93a clearly gives OCC authority to promulgate regulations interpreting Section 484. Section 93a grants the Comptroller broad authority "to prescribe rules and regulations to carry out the responsibilities of the office." As this Court has recognized, the Comptroller's responsibilities include supervising national banks, administering the NBA, and enforcing the federal banking laws. *Watters*, 550 U.S. at 6; *NationsBank*, 513 U.S. at 256. Those responsibilities encompass interpretation of Section 484, a provision of the NBA that specifically addresses the circumstances under which national banks can be subject to supervisory and enforcement activities.

Even if "specific evidence" of OCC's authority to make preemption determinations were required, federal banking laws contain ample evidence of that authority. For example, 12 U.S.C. 43 provides that, "[b]efore issuing any opinion letter or interpretive rule * * * that concludes that Federal law preempts the application to a national bank of" certain state laws (including fair lending laws), OCC must follow notice and comment procedures, including publication of its preemption determination in the *Federal Register*. 12 U.S.C. 43(a). See also 15 U.S.C. 6714 (addressing the appropriate level of deference for certain OCC determinations regarding the preemption of state laws regulating insurance sales or solicitation). Although Section 43 does not grant preemption authority to OCC (Pet. Br. 55-56), it is an express congressional acknowledgment that preemption determinations are among OCC's delegated "responsibilities." 12 U.S.C. 93a. And Congress's directive that OCC preemption determinations be preceded by notice-and-comment rulemaking strengthens the inference that such determinations should be accorded

Chevron deference. See *Mead Corp.*, 533 U.S. at 230 (explaining that "the overwhelming number of [the Court's] cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication").

4. OCC has not changed its position in any way that precludes deference

Petitioner asserts (Br. 36, 57) that OCC's interpretation of "visitorial powers" has been inconsistent. Even if petitioner were correct, that would not be a basis for declining to apply *Chevron* deference. See *National Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (*Brand X*). But, in any event, OCC regulations have long provided that, unless an exception applies, state officials have no authority to conduct examinations or to inspect or require the production of national bank books or records. 12 C.F.R. 7.4000(a)(1) (2005); *ibid.* (2000); 12 C.F.R. 7.4000(b) (1997); 12 C.F.R. 7.6025(b) (1984); *ibid.* (1972). OCC opinion letters and interpretive rulings likewise have consistently stated that Section 484 precludes States from demanding national bank records or taking administrative enforcement actions against national banks. See, *e.g.*, 1993 OCC Ltr. LEXIS 35 (July 19, 1993); 1993 OCC Ltr. LEXIS 10 (Feb. 26, 1993); 1993 OCC Ltr. LEXIS 8 (Jan. 15, 1993); 1992 OCC Ltr. LEXIS 1 (Jan. 15, 1992); 1989 OCC Ltr. LEXIS 24 (Mar. 22, 1989); 1983 OCC Ltr. LEXIS 22 (Dec. 21, 1983); 1981 OCC Ltr. LEXIS 55 (Mar. 26, 1981); 1979 OCC Ltr. LEXIS 11 (Aug. 1, 1979); 1979 OCC Ltr. LEXIS 47 (Apr. 2, 1979); Interpretive Ruling No. 6025 (1967); *ibid.* (1964); *ibid.* (1963). Although OCC did not take a definitive position on the scope of the "courts of justice" exception until

2004, OCC has never interpreted that exception to permit States to use the courts to regulate the federally authorized banking activities of national banks. And, in its 2004 rulemaking, OCC clarified that the exception does not give States that authority. 69 Fed. Reg. at 1904.

Petitioner is likewise wrong in asserting (Br. 36) that, until 2004, OCC had interpreted Section 484 to permit state officials to bring lawsuits to enforce state laws against national banks. That assertion is apparently based on statements OCC made in its pleadings in *First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999). See Pet. App. 109a. *Burke* involved a state administrative enforcement action against a national bank. The district court ruled that Section 484 precludes States from taking administrative enforcement actions against national banks but stated, in dictum, that the "courts of justice" exception allows judicial enforcement actions. *Burke*, 48 F. Supp. at 145-149. OCC, which was the prevailing party, did not appeal.

In its pleadings in *Burke*, OCC stated that Section 484 permits States to "obtain a judicial declaration as to the meaning of the applicable law." Reply Br. of Pl. in Intervention OCC in Support of Mot. for Prelim. Inj. at 11, *Burke*, *supra* (No. 32). In its district court pleadings in this case, OCC described its statements in *Burke* as an "acquiescence" in the dictum regarding judicial enforcement, but noted that, in its 2004 rulemaking, it had "comprehensively reevaluated" its interpretation of the "courts of justice" exception and disagreed with the *Burke* dictum. Mem. of Pl. OCC in Support of Mot. for Prelim. Inj. 25 n.20. In fact, OCC's statements in its *Burke* pleadings are fully consistent with its current regulation, which interprets "visitorial powers" not to

encompass declaratory judgment actions (because they seek only to ascertain the meaning of the law, not to enforce it). 69 Fed. Reg. at 1900. In any event, to the extent that OCC's statements in *Burke* created any uncertainty about the scope of the "courts of justice" exception, that simply indicates "that there was good reason for the Comptroller to promulgate the new regulation." *Smiley*, 517 U.S. at 743.

C. OCC's Interpretation Of The Term "Visitorial Powers" Is More Consistent With The Text, Structure, and Purposes of the NBA Than The Alternative Construction Advanced By Petitioner

1. OCC's interpretation of "visitorial powers" is consistent with the understanding of that term that prevailed when the NBA was enacted

In 1864, when Congress enacted the NBA, legal dictionaries defined the term "visitation" broadly to include "[i]nspection; superintendence; direction"; and "regulation." 2 Alexander M. Burrill, *Law Dictionary and Glossary* 598 (1860); accord Henry C. Black, *A Dictionary of Law* 1225 (1891). The term was further defined as "[t]he act of examining into the affairs of a corporation," without limitation to any particular affairs, such as internal management or charter compliance. 2 John Bouvier, *A Law Dictionary* 633 (1852). Those definitions reflect the fact that, when the NBA was enacted, the state's visitorial powers over civil corporations were understood to include a broad supervisory authority, exercised to protect the public and enforce compliance with public laws. Moreover, state officials ordinarily exercised that supervision by initiating judicial enforcement actions. *Id.* at 634 ("visitation of civil corporations

is by the government itself, through the medium of the courts of justice").

The concept of "visitation" originated in Roman law and canon law, where the term described the exclusive authority exercised by the Church hierarchy over Church institutions. It gradually evolved to include the authority of founders over the charitable organizations they endowed and, later, the King over the civil corporations he chartered. Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 369-370 (1936). Thus, in the 1760s, Blackstone described parallel but distinct systems of visitation for ecclesiastical, eleemosynary, and civil corporations. 1 William Blackstone, *Commentaries* *467-*472.

Ecclesiastical institutions were visited by the ordinary, who ensured their proper behavior in accordance with canon law. Blackstone *468. Eleemosynary institutions were generally subject to the supervision of a "private visitor," ordinarily either the founder or someone he had appointed. Pound 370; Blackstone *469; *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 673-677 (1819) (Story, J., concurring). The private visitor's authority derived from the founder's right "to see that [his] property [was] rightly employed." Blackstone *469; see Horace L. Wilgus, *Private Corporations* § 159, at 225-226 (1911); Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 687, at 637 (7th ed. 1861). The source of the private visitor's authority, and the nature and object of eleemosynary organizations, dictated a narrow scope for the private visitor's duties: his task was to ensure that the organization adhered to the rules and pursued the purposes set out in its founding documents. See *id.* § 684, at 636; Charles B. Elliott, *A*

Treatise on the Law of Private Corporations § 90, at 94 (Howard S. Abbott ed., Bobbs-Merrill 4th rev. ed.) (1893); James Grant, *A Practical Treatise of the Law of Corporations in General, As Well Aggregate as Sole* 512 (1854); 2 Stuart Kyd, *A Treatise on the Law of Corporations* 276 (1794).

Unlike ecclesiastical and eleemosynary institutions, however, civil corporations were founded by the government for public purposes. Accordingly, they were visited by the government itself, and the government's visitorial powers were broader than those of a private visitor. See Elliott § 90, at 94 (stating that the government's visitorial power over civil corporations "is founded more on grounds of public policy than on any theory of succession to the rights of a prehistoric founder. As a general rule the state has the same control, in this respect, over corporations that it has over individuals."); Angell & Ames § 684, at 636 ("Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power whose duty it is to take care of the public interest."); 1 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* § 475, at 580 (2d ed. 1908) ("In its visitorial capacity the state checks and controls corporate affairs, even for the protection of those who deal with them."). The government traditionally exercised those broad visitorial powers over civil corporations "through the medium of the courts of justice." Elliott § 90, at 94. Thus, Blackstone explained that civil corporations were "visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of common law." Blackstone *469. There, "all misbehaviours of this kind

of corporations [were] enquired into and redressed." *Ibid.*

In the United States, state governments generally were the charterers and visitors of civil corporations. Thompson § 476, at 581. The States commonly exercised their visitorial powers through court actions by their attorneys general using prerogative writs, such as mandamus, or the equitable writ of injunction. Wilgus § 153, at 221; Pound 374-388. Those writs enabled the States to police compliance by corporations with not only their charters and internal regulations but also public laws. "The basis of mandamus to private corporations and their officers [was] the visitorial jurisdiction of the state over all corporations which it has created," and mandamus could be used "to compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters, or under statutes or ordinances or imposed by the common law." *Id.* at 375; S.S. Merrill, *Law of Mandamus* § 158, at 194 (1892) ("[U]nder the visitorial power of the state, any breach of duty by a private corporation may be corrected by this writ."); *ibid.* (The duty "may be imposed by its charter, by the general statutes, or by the common law.") (footnotes omitted); accord Wilgus § 156, at 223. Of particular relevance here, mandamus was used to compel common carriers and certain other corporations to comply with "statutory or common law" obligations "of extending to all without discrimination the use of their services." Merrill § 162, at 200. States could also seek injunctions "whenever a corporation [wa]s abusing the power given it for a public purpose, or acting adversely to the public, or creating a nuisance." *Id.* § 157, at 224-225; accord 4 Eugene A. Gilmore & William C. Wermuth, *Modern American Law* § 81, at 101 (1921).

Beginning in the 19th century, States also exercised visitorial powers over corporations through commissions or "public" visitors. Wilgus § 160, at 226; Gilmore & Wermuth § 80, at 100-101. Those commissions "exercise[d] a general supervision" "for the protection of the public." *Ibid.*; Wilgus § 160, at 226. That was particularly true of banking regulation, where the State's "visitorial" authority "extend[ed] to the minutest details of the banking business," to "protect the public by any and all reasonable regulations necessary to that end." Thompson § 460, at 556.

Several state statutes gave banking commissioners broad authority to investigate banks' compliance with any public laws bearing on their banking business and to bring judicial actions to enforce those laws. For example, an 1838 Massachusetts statute authorized state commissioners to "visit" every bank and "examine all [its] affairs" to determine whether it had "complied with the provisions of law applicable to [its] transactions." Act of Feb. 23, 1838, ch. 14, § 2, 1838 Mass. Acts 303. If the commissioners concluded that a bank had "exceeded its powers, or ha[d] failed to comply with all of the rules, restrictions and conditions provided by law," the commissioners were authorized to apply to the state supreme court for an injunction. § 5, 1838 Mass. Acts 304. In addition, when the commissioners concluded that a bank had "violated any law of this Commonwealth," they were required to make a special report to the legislature. § 6, 1838 Mass. Acts 305.

New York's banking statutes gave its commissioners similarly broad authority. The commissioners were instructed to "visit" every banking corporation and "thoroughly to inspect [its] affairs." Safety Fund Act, ch. 94, § 15, 1829 N.Y. Laws 170. If they "ascertain[ed] from

such inspection, and examination, or in any other manner, that any of said corporations * * * ha[d] violated any of the provisions of their acts or acts of incorporation, or of any other act binding on such corporations," the commissioners were required immediately to seek an injunction against the bank. § 18, 1829 N.Y. Laws 170. See Act of May 14, 1840, ch. 363, § 12, 1840 N.Y. Laws 307-308 (authorizing the commissioners to bring a judicial action against any banking association or individual banker "found to have violated any law of this state * * * in the same manner and with the like effect as any incorporated bank may be proceeded against for a violation of its charter"). The broad visitorial powers exercised by New York's banking commissioners are particularly relevant to the interpretation of the NBA because, as petitioner notes (Br. 21), Congress modeled the NBA on New York's regulatory system. John Jay Knox, *A History of Banking in the United States* 422 (1903).

Petitioner is therefore wrong in contending (Br. 24-26) that, when the NBA was enacted, the term "visitorial powers" was understood to be limited to supervision of a corporation's internal management and charter compliance. In particular, petitioner's reliance (Pet. 25) on treatise discussions addressing the powers of private visitors over eleemosynary corporations is misplaced because, as discussed above, the authority of those private visitors was considerably narrower than the powers of the state and its public visitors over civil corporations, especially banking corporations. Indeed, the very treatises cited by petitioner indicate that the State could invoke mandamus when corporations "refuse[d] to perform a duty cast upon them by the law of the land." Grant 262; accord Kyd 293-314 (giving examples of

where mandamus lies to execute statutes and common law duties).

Far from supporting petitioner's narrow view of the term "visitorial powers," NBA-era sources suggest that the term was often used to describe state officials' enforcement of *all* state laws that applied to banks, even laws unrelated to the business of banking. In interpreting Section 484 in its current form, however, OCC did not adopt so broad a reading of the term "visitorial powers," but instead construed that term not to encompass enforcement of state laws unrelated to the business of banking. See p. 15, *supra*. OCC recognized that, in today's environment, state officials' enforcement against national banks of laws that do not concern banking powers is unlikely to undermine the national banking system or interfere with OCC supervision, and that OCC's own expertise lies in supervising banking activities rather than enforcing compliance with state laws aimed at unrelated conduct.

As the court of appeals explained, OCC thus "reached a permissible accommodation of conflicting policies that were committed to it by the statute," by "shield[ing] national banks 'from unduly burdensome and duplicative state regulation' in the exercise of their federally authorized powers," while "leaving state officials free to enforce a wide range of laws that do not purport to regulate a national bank's exercise of its authorized banking powers." Pet. App. 28a-29a (quoting *Watters*, 550 U.S. at 11). OCC's decision not to adopt the broadest possible reading of the term "visitorial powers" that NBA-era sources might support was wholly reasonable and is in any event unchallenged in this case. Those sources strongly indicate, however, that petitioner's far narrower interpretation of the stat-

utory language is not required by the NBA's text or history.

2. OCC's interpretation of the term "visitorial powers" is supported by the structure of Section 484

Section 484(a)'s general prohibition against the unauthorized exercise of "any visitorial powers" over national banks is qualified by four exceptions. Those exceptions shed light on the meaning of the term "visitorial powers" because they imply that the relevant activities would otherwise be encompassed by the general prohibition. See, *e.g.*, *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 658 (1924) (*St. Louis*) (provision allowing national banks that convert from state charters to retain preexisting branches confirmed that branch banking was generally prohibited). The exceptions in Section 484 support OCC's view that the term "visitorial powers" is not limited to supervision of internal bank affairs and charter compliance, but also encompasses state efforts to obtain bank records for other purposes.

For example, Section 484(b) provides that, "[n]otwithstanding" Section 484(a)'s general prohibition on the exercise of visitorial powers, "State auditors and examiners may," under specified circumstances, "review [a national bank's] records solely to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. 484(b). Those laws are not components of a bank's charter and do not regulate its internal affairs; indeed, they are not even specific to banking. Accordingly, Section 484(b) demonstrates that "visitorial powers" are not limited to supervisory oversight over internal management and charter compliance, but also include reviewing bank records to ensure compliance with public laws. That conclusion is reinforced by

Section 484(b)'s use of the word "solely," which indicates that, unless some other exception applies in a particular circumstance, the "visitorial powers" prohibition bars state inspection of national bank records for purposes other than enforcement of unclaimed property and escheat laws.[4]

The other exceptions in Section 484 also confirm that the term "visitorial powers" encompasses state efforts to obtain bank records for a broad range of purposes, including monitoring compliance with public laws. Section 484(a) includes an exception for visitations "authorized by Federal law." 12 U.S.C. 484(a). One such visitation is described in 26 U.S.C. 3305(c), which provides that "[n]othing contained in [Section 484] shall prevent any State from requiring any national" bank to provide payroll records and reports for unemployment tax purposes. Similarly, 12 U.S.C. 62 permits "the officers authorized to assess taxes under State authority" to inspect national bank shareholder lists. Both provisions would be unnecessary if the concept of "visitation" were limited to supervisory oversight of internal management and charter compliance.[5]

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[4] As explained above (see p. 15 & n.2, *supra*), although OCC's regulation precludes state-initiated enforcement actions only when those actions seek to enforce laws related to the business of banking, the regulation defines the term "visitorial powers" to encompass all governmental demands for national bank records. The statutory exceptions described in the text, which authorize state officials to demand records relevant to the enforcement of escheat and tax laws that are unrelated to the business of banking support the reasonableness of OCC's approach.

[5] Other provisions of federal law, such the FH Act, also expressly authorize certain types of visitation by federal and state agencies other

Section 484(a) also contains an exception permitting Congress and its committees to exercise visitorial powers over national banks. That exception likewise reflects the broad scope of the term "visitorial powers." Congress and its committees do not ordinarily examine banks to ensure charter compliance or supervise corporate governance, but congressional committees frequently request or subpoena business records to aid in the drafting and consideration of new legislative proposals. Indeed, the congressional exception was added precisely because Section 484's predecessor would otherwise have precluded Congress from demanding bank records for legislative purposes. In the early 1900s, several national banks, relying on the NBA's "visitorial powers" provision, refused to provide records requested by a congressional committee. In response, the committee's counsel recommended adoption of the exception. He explained that the exception was necessary because, under the NBA, "[t]he visitorial power over the banks is vested solely in the Comptroller of the Currency, and Congress can not investigate the banks and find out what they are doing as a basis for remedial legislation." *Hearings Before the Senate Committee on Banking and Currency*, 63d Cong., 1st Sess. 1322 (1913) (statement of Samuel Untermyer).

The final exception, for visitorial powers "vested in the courts of justice," also supports OCC's interpretation. Like Congress, the courts do not themselves supervise banks' internal management or charter compliance. In cases that are otherwise properly before them, however, courts regularly issue subpoenas or other or-

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than OCC. See 42 U.S.C. 3614 (Department of Justice); 42 U.S.C. 3610 (Department of Housing and Urban Development (HUD)); 42 U.S.C. 3610(f) (state and local agencies certified and monitored by HUD).

ders requiring the production of bank records. The "courts of justice" exception permits those normal judicial processes in actions that are not otherwise "visitorial" or are "visitorial" but authorized by federal law. 12 C.F.R. 7.4000(b)(2); 68 Fed. Reg. at 6369-6370.

As this Court held in *Guthrie* v. *Harkness.*, 199 U.S. 148, 159 (1905), because visitation over banks and other civil corporations is a "public right," efforts by private individuals to inspect bank records or to sue banks for redress of injury do not involve the exercise of "visitorial powers." The "courts of justice" exception ensures that private individuals may utilize the judicial process for those purposes, even though, because courts are state actors, judicial orders compelling bank documents might otherwise fall under the "visitorial powers" prohibition. See *ibid.*; 68 Fed. Reg. at 6369. By contrast, the bringing of a lawsuit by the New York Attorney General is itself the exercise of "visitorial powers," separate and distinct from any exercise of judicial power that the suit is intended to prompt.[6]

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[6] In the courts below, petitioner argued that his own initiation of a judicial enforcement action would be authorized by the "courts of justice" exception even if state administrative enforcement would constitute a prohibited exercise of "visitorial powers." See Pet. App. 22a, 108a. Petitioner has apparently abandoned that argument in this Court (but see Br. 37 n.16), although some amici (*e.g.*, States Br. 21-22) continue to press it. As both courts below correctly concluded, OCC reasonably refused to interpret the "courts of justice" exception as authorizing state officials to initiate lawsuits to enforce laws that they could not enforce administratively. Such an interpretation is not supported by the exception's text, which refers to powers "vested in," not "exercised through," the courts of justice. Nor would it be consistent with the overall thrust of Section 484, because it "would swallow the rule" against unauthorized exercises of visitorial authority. Pet. App. 30a. When the NBA was enacted, lawsuits were the primary

Petitioner contends (Br. 36-39) that the exceptions described above were enacted to resolve disputes about whether the relevant activities were in fact "visitorial." It is far from clear that every exception was the product of such a dispute. But in any event, Congress did not amend the general prohibition to clarify that the term "visitorial powers" has the limited construction petitioner espouses. Instead, in each case, Congress created an *exception* to the general prohibition. And even if the exceptions do not conclusively refute petitioner's understanding of the term "visitorial powers," they demonstrate that petitioner's proposed definition is hardly *unambiguously* correct. Because OCC's interpretation of ambiguous NBA provisions is entitled to deference, that is a sufficient basis for rejecting petitioner's challenge to OCC's regulation.

3. OCC's interpretation advances the purposes of the NBA, including Section 484

Enacted during the Civil War, the NBA created a national banking system, "extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States." *Watters*, 550 U.S. at 14 (quoting *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903)). Congress viewed the national banking system as critical to the Nation's survival—essential to financing the war, establishing a national currency, and promoting a strong national economy. See, *e.g.*, Cong.

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means by which state officials exercised visitorial powers. *Guthrie*, 199 U.S. at 157; pp. 28-29, *supra*. Section 484's general prohibition would therefore have been virtually meaningless if the "courts of justice" exception permitted all visitations accomplished through lawsuits.

Globe, 38th Cong., 1st Sess. 1376 (1864) (Rep. Kasson); *id.* at 1451 (Rep. Hooper); *id.* at 1893-1894 (Sen. Sumner); *id.* at 1897 (Sen. Sherman); *id.* at 2128-2130 (Sen. Sumner); *id.* at 2130 (Sen. Chandler).

The legislative debates that culminated in the NBA's enactment reflected Congress's concern that the States would seek to undermine the new national banks, which were designed to replace existing state-chartered banks. *Tiffany*, 85 U.S. (18 Wall.) at 412-413; *e.g.*, Cong. Globe 1375 (Rep. Pike); *id.* at 1376 (Rep. Miller); *id.* at 1256, 1451 (Rep. Hooper); *id.* at 1893-1894, 2128-2130 (Sen. Sumner). Accordingly, Congress included in the NBA protections against potential state interference. For example, wary that state usury laws could impair the survival and prosperity of national banks, Congress provided a federal formula that constrained state regulation of national bank interest rates and an exclusive federal remedy for usury claims against national banks. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 10-11 (2003); 12 U.S.C. 85-86. Similarly, instead of relying on state contract law, Congress provided a federal remedy, administered by the Comptroller, for failures by national banks to redeem their circulating notes. NBA §§ 46-48, 13 Stat. 113-114.

The NBA's "visitorial powers" provision was an integral part of Congress's effort "[t]o prevent inconsistent or intrusive state regulation from impairing the national system." *Watters*, 550 U.S. at 11. OCC's interpretation of that provision as encompassing all state efforts to investigate or enforce national bank compliance with laws concerning federally authorized banking powers furthers that purpose. Subjecting a national bank's exercise of those powers "to the State's investigative and enforcement machinery would surely interfere with the

banks' federally authorized business." *Id.* at 13. State investigation and enforcement would also interfere with OCC's efforts to provide uniform and coherent supervision since "[c]onfusion would necessarily result from control possessed and exercised by two independent authorities." *Id.* at 14 (quoting *Easton*, 188 U.S. at 232). Such "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking, [this Court] observed over a century ago, is precisely what the NBA was designed to prevent." *Id.* at 13-14.

As explained above, one means by which the NBA protects the national banking system against interference from state officials is by preempting the application to national banks of substantive state laws that "significantly impair the exercise" by national banks of powers that are "enumerated or incidental under the NBA." *Watters*, 550 U.S. at 12. Even when state law is not preempted, however, because its substantive requirements essentially track those imposed by analogous federal statutes, enforcement of that law by state officials could undermine OCC's supervision of the national banking system if those officials adopted different enforcement priorities or preferred different remedies than their OCC counterparts. See J.A. 120a (Decl. of Grace E. Dailey, Deputy Comptroller for Large Bank Supervision); *Easton*, 188 U.S. at 232 (explaining that state control would necessarily result in confusion because "it would have to be exercised and limited by [the State's] own discretion"). For example, state officials might bring enforcement actions for diverse kinds of injunctive relief that take little account of the root causes of the problem or the effect of the required future conduct on the overall operations of the bank. The OCC, by contrast, can invoke a broad range of remedial actions tai-

lored to assure compensation of injured parties, while maintaining the integrity of the national banking system, not only within the State where the particular complaint initially arose, but nationwide if warranted.

The potential for inconsistent direction regarding the exercise of core banking powers is particularly acute in the context of fair lending laws. Determining whether a bank has violated such laws requires careful review of the bank's underwriting and pricing decisions and judgments about whether those decisions were justified or required by safe and sound lending practices. See 59 Fed. Reg. 18,270 (1994); *HMDA Data Questions* 5-6; p. 4, *supra*. Thus, even when a state fair lending statute is not preempted because its substantive requirements are not meaningfully different from those imposed by federal law, enforcement of the law by state officials poses a significant threat to national banks' performance of their federal responsibilities and to OCC's exercise of its supervisory duties.[7]

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[7] Petitioner also argues (Br. 40) that state enforcement of applicable state laws poses no greater risk of interfering with bank powers or OCC supervision than private suits to enforce the same laws, which Section 484 does not preclude. That is incorrect. Private suits do not pose a danger comparable to the purposeful state efforts to undermine the national banking system that motivated Section 484's enactment. In addition, allowing private suits under non-preempted state laws furthers the strong countervailing interest in permitting individuals to obtain redress for injuries they have suffered. And, to the extent that private enforcement actions actually prevent or significantly interfere with a bank's exercise of its federal powers or with OCC's supervision, those suits would be barred under conflict-preemption principles. See *Watters*, 550 U.S. at 12.

4. This Court's decisions in Guthrie *and* Watters *support OCC's interpretation*

a. In *Guthrie*, this Court held that an action by a private shareholder of a national bank seeking access to the bank's books and records was not prohibited by Revised Statutes § 5241 (1875), the predecessor to Section 484 then in effect. The Court concluded that the "visitorial powers" prohibition did not encompass the "private right" of the shareholder to inspect the bank's records because "[t]he right of visitation" is a "public right." *Guthrie*, 199 U.S. at 158-159.

In reaching that conclusion, the Court reviewed various definitions of the term "visitation," some of which primarily discussed supervision of corporate governance, but several of which made clear that the term also encompasses other exercises of supervisory and regulatory power. For example, the Court cited approvingly Bouvier's definition of "visitation" as "[t]he act of examining into the affairs of a corporation." *Guthrie*, 199 U.S. at 157. The Court also cited a circuit court case stating that "[v]isitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations" and noting Burrill's broad definition of "visitation" as "inspection; superintendence; direction; regulation." *Id.* at 158 (quoting *First Nat'l Bank* v. *Hughes*, 6 F. 737, 740 (C.C.N.D. Ohio 1881)). And the Court quoted Merrill's statement that "[v]isitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings." *Ibid.* (quoting Merrill § 175, at 213).

The Court also explained the breadth of the visitorial exclusivity intended by Congress, explaining that "Congress had in mind in passing [Section 5421] that in other sections of the law it had made full and complete provision for investigation" of national banks by the Comptroller and his examiners, as well as for remedial action against the bank. *Guthrie*, 199 U.S. at 159. The Court observed that "[i]t was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Ibid.*

Guthrie thus supports OCC's interpretation of the term "visitorial powers," making clear that, for civil corporations, the term denotes governmental (as opposed to private) enforcement actions. Petitioner's assertion (Br. 27) that the plaintiff's status as a private individual asserting a private right "was not critical to the decision" in *Guthrie* cannot be squared with the Court's statement of the reasons for its holding. See *Guthrie*, 199 U.S. at 158-159. Contrary to petitioner's contention (Br. 26-27), the Court did not rely on a distinction between "supervisory oversight regimes" and "enforcement of other valid legal obligations of the bank." Indeed, that distinction is inconsistent with the Court's broad description of the reasons for, and the scope of, the "visitorial powers" prohibition.

b. *Watters* also supports OCC's interpretation. The Court in *Watters* held that a national bank's mortgage lending business, "whether conducted by the bank itself or through the bank's operating subsidiary, is subject to OCC's superintendence, and not to the licensing, reporting, and visitorial regimes of the several States in which the subsidiary operates." 550 U.S. at 7. Although the

decision turned primarily on implied conflict preemption, the Court's analysis indicates that the term "visitorial powers" encompasses petitioner's investigation and threatened enforcement efforts against national banks.

Watters involved Michigan laws regulating mortgage brokers, lenders, and servicers. 550 U.S. at 8. The laws imposed various registration, supervisory, and reporting requirements, and they provided for enforcement of those requirements through judicial actions by the state commissioner of insurance and financial services or the state attorney general. *Id.* at 9-10 (citing, *inter alia*, Mich. Comp. Laws Ann. § 445.1661 (West 2002); *id.* § 493.56b (West Supp. 2005)). The laws also gave the commissioner investigative authority, including administrative subpoena authority. Mich. Comp. Laws Ann. § 445.1661 (West 2002); *id.* § 493.56b (West Supp. 2005). The State conceded that those provisions could not properly be applied to national banks themselves, but it argued that its regulatory regime could be enforced "with respect to national banks' operating subsidiaries." *Watters*, 550 U.S. at 15.

This Court made clear, consistent with the State's concession, that application of the pertinent Michigan laws to national banks would constitute an exercise of "visitorial powers" prohibited by Section 484. 550 U.S. at 13-15. The Court relied on both *Guthrie* and OCC's regulation, specifically citing OCC's definition of "visitorial powers" as including both "[i]nspection of a bank's books and records" and "[e]nforcing compliance with any applicable federal or state laws concerning" federally authorized banking activities. *Id.* at 14 (citing 12 C.F.R. 7.4000(a)(2)). The Court concluded that Michigan could not "confer on its commissioner examination

and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15. Given the significant similarities between the powers authorized by the Michigan laws and the powers asserted by petitioner, *Watters* strongly supports OCC's regulation and the court of appeals' judgment upholding the injunction.[8]

5. OCC's interpretation is supported by other provisions of federal banking law

OCC's interpretation of "visitorial powers" is also consistent with the approach Congress has taken when explicitly addressing enforcement of state fair lending laws against national banks. In the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal), Pub. L. No. 103-328, 108 Stat. 2338, Congress authorized national banks to operate interstate bank branches. Riegle-Neal also explicitly addressed the application of state fair lending laws to those interstate branches. Congress provided that such state laws ordinarily apply to the interstate branches of national banks unless federal law preempts their application to national banks in general. 12 U.S.C. 36(f)(1)(A). Congress further directed, consistent with OCC's interpretation of Section 484, that "[t]he provisions of any State

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[8] The dissenting Justices in *Watters* likewise described as "visitorial" the laws giving investigative, subpoena, and enforcement authority to the commissioner and authorizing judicial enforcement by the state attorney general. 550 U.S. at 34 (citing Mich. Comp. Laws Ann. § 445.1661 (West 2002); *id.* § 493.56b (West Supp. 2005)). Those Justices would have held, however, that application of the challenged state laws to national-bank operating subsidiaries was neither barred by Section 484 nor otherwise preempted because Section 484 applies only to the exercise of visitorial power over national banks themselves. See *id.* at 34-35.

law to which a branch of a national bank is subject under this paragraph shall be enforced, with respect to such branch, by the [OCC]." 12 U.S.C. 36(f)(1)(B).

Contrary to petitioner's contention (Br. 34-36), OCC's enforcement authority under Section 36(f)(1)(B) is clearly exclusive. Section 36(f)(1)(A) provides that specified state laws generally apply to interstate branches of national banks unless the laws are preempted, and Section 36(f)(1)(B) provides that such state laws "shall be enforced" by OCC. Taken together, the use of the passive voice and the word "shall" make clear that Congress intended for the non-preempted state laws to be enforced by OCC and OCC alone. Indeed, Congress has used the same phrasing in other financial services laws to confer exclusive enforcement authority. See 15 U.S.C. 6711 (providing that "insurance activities of any person," including national banks, "shall be functionally regulated by the States" subject to certain limitations).

As petitioner notes (Br. 34-36), Riegle-Neal's text, see 12 U.S.C. 36(f)(3), and legislative history indicate that Congress intended its provisions to reflect, rather than to alter, the existing balance between federal and state authority. Riegle-Neal also refutes petitioner's suggestion (Br. 43) that the purportedly "aberrant" nature of the enforcement regime that OCC's regulation contemplates, under which non-preempted state fair lending laws will be enforceable against national banks solely by OCC rather than by state officials, provides a basis for declaring the regulation invalid. Though such a regime is unusual, Riegle-Neal unambiguously mandates that enforcement scheme with respect to the interstate branches of national banks. There is no reason to suppose that Congress gave state officials greater en-

forcement authority over national banks themselves than over their interstate branches. Accordingly, Congress's decision to vest OCC with exclusive authority to enforce state fair lending laws that apply to the interstate branches of national banks strongly supports OCC's interpretation of Section 484.

D. Petitioner's Arguments That OCC's Interpretation Is Unreasonable Are Not Persuasive

1. a. In arguing that OCC's interpretation of "visitorial powers" is unreasonable, petitioner primarily contends (Br. 21-32) that the term is unambiguously limited to "supervisory oversight" of a "bank's safety and soundness, internal organization, or charter compliance," Br. 26. As explained above, that contention cannot be squared with the text, structure, and purposes of the NBA, or with this Court's decisions in *Guthrie* or *Watters*. And while petitioner posits a dichotomy between "supervisory oversight" and "[e]nforcement of [g]enerally [a]pplicable [l]aw," Br. 21, the New York fair lending law at issue here does not fall within either category. Although the law serves purposes other than ensuring the safety and soundness of regulated banks, it applies only to those "who extend credit" (Pet. Br. 24 n.7), and its enforcement provisions reflect its focus on the banking business. One of the primary enforcement mechanisms is by complaint to the New York banking superintendent, who then resolves the complaint through an administrative process. N.Y. Exec. Law § 296-a(6)-(10) (McKinney 2005). Moreover, the banking superintendent is "empowered to promulgate rules and regulations" to effectuate the law. *Id.* § 296-a(11).

Unlike (for example) a general prohibition on racial discrimination in employment, the New York law regu-

lates core banking powers granted by a national bank's charter—the powers to engage in residential and other lending. 12 U.S.C. 24(Seventh), 371(a). Enforcement will necessarily require the State to engage in "supervisory oversight" of the bank's exercise of those powers and to make decisions that affect its safety and soundness. As described above, it is impossible to determine whether a bank has engaged in unlawful lending discrimination without making judgments about whether the bank appropriately exercised its lending powers, including whether its actions were driven by safe and sound lending practices. See p. 42, *supra*.[9]

b. Petitioner asserts (Br. 21-24) that his interpretation of "visitorial powers" is supported by Congress's original placement of the visitorial exclusivity provision in Section 54 of the NBA, which primarily addressed the Comptroller's examination authority. Even if the scope of "visitorial powers" were coextensive with the scope of the Comptroller's examination authority, that would not mean that "visitorial powers" are limited to supervision of a bank's safety and soundness, internal organization and charter compliance, because Section 54 in its original form authorized the Comptroller to "make a thorough examination into *all* the affairs" of the bank. NBA § 54, 13 Stat. 116 (emphasis added). In any event, Congress's initial placement of the visitorial powers provi-

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[9] Moreover, compliance with fair lending laws is an essential component of safe and sound operation. Letter from John C. Dugan, Comptroller of the Currency, to Rep. Barney Frank (Nov. 21, 2005). Failure to comply with fair lending or other consumer protection requirements exposes the bank to the risk of litigation, monetary judgments, and reputational harm, all of which would adversely affect its safety and soundness. See OCC Advisory Ltr. 2002-3 (Mar. 22, 2002).

sion in Section 54 does not suggest that "visitorial powers" and "examination" are synonymous. On the contrary, Congress's use of distinct terms suggests that they have different meanings.

2. Petitioner also contends (Pet. 27-32) that OCC's interpretation of Section 484 is foreclosed by certain decisions of this Court. Contrary to that contention, none of those decisions mentions, much less construes, Section 484, its predecessor provisions, or the term "visitorial powers." Nor did the Court have the opportunity to consider the regulation at issue in this case, which was not promulgated until long after those decisions were issued.[10]

In any event, none of the decisions indicates that petitioner has authority to enforce state fair lending laws against national banks or to demand national bank records in aid of that enforcement effort. Petitioner principally relies (Br. 28-30) on *St. Louis*, which involved Missouri's suit against a national bank to enforce a state statute prohibiting banks from operating branches. The Court first determined that federal law at the time did not authorize national banks to engage in branch banking (except in one circumstance inapplicable to the bank at issue). 263 U.S. at 655-659. The Court

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[10] In *Brand X*, 545 U.S. at 982, this Court held that, under *Chevron*, an agency may adopt a statutory interpretation that differs from the interpretation previously reached by a federal court so long as the prior judicial construction was not based on the "unambiguous terms of the statute." None of the decisions cited by petitioner could have been based on the "unambiguous terms" of Section 484, because none even mentions that statute. Thus, even if any of the decisions could be construed as adopting, *sub silentio*, an interpretation of Section 484 that is inconsistent with OCC's regulation, the regulation's superseding interpretation of the term "visitorial powers" would still be controlling if it is reasonable.

then held that, because "the power sought to be exercised by the bank finds no justification in any law or authority of the United States, the way is open for the enforcement of the state statute." *Id.* at 660.

OCC's current interpretation of the term "visitorial powers" is wholly consistent with the Court's analysis in *St. Louis* because the Missouri law at issue there concerned an activity (branch banking) that was not authorized for national banks at that time. The State's suit therefore did not seek to "[e]nforc[e] compliance" with a law concerning "activities authorized or permitted pursuant to federal banking law." 12 C.F.R. 7.4000(a)(2). Here, in contrast, New York's fair lending law concerns activities—real estate and other lending—that are unquestionably among the authorized activities of national banks under federal banking law.

The other cases cited by petitioner are similarly inapposite. *National Bank* v. *Kentucky*, 76 U.S. (9 Wall.) 353 (1870), and *Waite* v. *Dowley*, 94 U.S. 527 (1877), involved state laws effectuating collection of state taxes on national bank shareholders. Because the NBA expressly authorized those taxes, the Court concluded that the States had implicit authority to take reasonable measures to collect them. See *id.* at 533-534; *National Bank*, 76 U.S. (9 Wall.) at 363. Here, by contrast, no provision of the NBA authorizes New York to enact or to enforce fair lending laws against national banks.

Petitioner's reliance on *First National Bank of Bay City* v. *Fellows*, 244 U.S. 416 (1917), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), is likewise misplaced. *Fellows* involved a state lawsuit challenging as unconstitutional a federal law giving trust powers to national banks. The bank did not invoke

the "visitorial powers" prohibition but instead argued that the suit could not proceed "in a state court" because the powers of national banks are "susceptible only of being directly tested in a federal court." 244 U.S. at 427. In rejecting that contention, the Court reasoned that "the particular functions in question [trust powers] by the express terms of the act of Congress were given only 'when not in contravention of State or local law.'" *Id.* at 428; see 12 U.S.C. 92a(a). The Court therefore concluded that "the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law." *Ibid.* That reasoning has no relevance here because a national bank's lending powers are not conditioned on state authorization. *Dickinson* is even further afield. It involved a suit by a bank, not by a State, and the only issue addressed by this Court was whether the bank's activity constituted "branch[ing]" under 12 U.S.C. 36 (1970), which at that time authorized national banks to engage in branch banking only to the extent permitted by state law.

Anderson National Bank v. *Luckett*, 321 U.S. 233 (1944) (*Anderson*), also does not support petitioner. That case concerned the validity of a Kentucky statute requiring banks to turn over to the State deposits that had remained inactive or unclaimed for specified periods. The bank did not argue, and the Court did not address, any claim that enforcement of the statute would violate the "visitorial powers" provision. Instead, the Court considered and rejected the bank's arguments that the state law was preempted by the NBA and that it "unconstitutionally interfere[d]" with the bank as an "instrumentalit[y] of the Federal Government." *Id.* at

239-240. This Court's determination that a national bank could be subjected to the substantive obligations imposed by the challenged state law, see *id.* at 247-252, is consistent with OCC's current recognition that, although Section 484 precludes state officials from undertaking the enforcement actions that are at issue in this case, it does not preempt the application to national banks of state fair lending laws.

The *Anderson* Court's further statement that Kentucky could "enforce" its statute, and, as an incident thereto, could require national "banks to file reports of inactive accounts," 321 U.S. at 252-253, appears inconsistent with the terms of the visitorial powers provision as it existed at that time. But Congress has since amended the provision to add an exception permitting enforcement of state escheat and unclaimed property laws. 12 U.S.C. 484(b); see pp. 35-36, *supra*. The result in *Anderson* is therefore consistent with OCC's interpretation of current Section 484.

3. Petitioner also argues that OCC's interpretation of "visitorial powers" cannot be correct because it would mean that "no governmental authority had the power to enforce valid state law against national banks" between 1864, when the NBA was enacted, and 1966, when Congress gave OCC authority to issue cease-and-desist orders to enforce state laws. Pet. Br. 32. That argument ignores the fact that, since the NBA was first enacted, OCC has been authorized to investigate whether national banks were complying with applicable state laws. See NBA § 54, 13 Stat. 116. Although OCC did not always have *formal* authority to compel banks to comply with those laws, OCC could use its *informal* supervisory authority to achieve compliance. Indeed, OCC frequently uses informal supervisory leverage to obtain

compliance with applicable laws and sound banking practices. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963). And, beginning in 1933, OCC had authority to take formal action against directors and officers of national banks for violations of "any law relating to such bank." Banking Act of 1933, ch. 89, § 30, 48 Stat. 193. Moreover, as noted above, Section 484 does not preclude private suits to enforce applicable laws. Accordingly, individuals injured by a national bank's violation of non-preempted state laws have always been able to seek redress in the courts.

4. Petitioner further contends (Br. 35-36) that OCC's regulation is unreasonable because OCC lacks the capacity or the inclination to enforce state fair lending laws against national banks. That is incorrect.

OCC has general enforcement authority to compel national banks to comply with all laws, both state and federal. 12 U.S.C. 1818(b); *National State Bank* v. *Long*, 630 F.2d 981, 988 (3d Cir. 1980). In addition, OCC has specific authority to enforce compliance by national banks with various federal consumer protection laws, including the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, which prohibits the same misconduct that petitioner alleged as the basis for his investigation and threatened enforcement actions in this case. Compare 15 U.S.C. 1691 with N.Y. Exec. Law § 296-a(1) (McKinney 2005).

OCC employs nearly 2000 bank examiners. New examiners are trained to examine for both safety and soundness and consumer compliance, and OCC has many examiner specialists who have professional certifications and extensive expertise in compliance, including fair lending. The largest national banks are examined continuously, including for fair lending issues, by on-site

examination teams, and other banks receive regular periodic examinations. *Hearings Before the House Committee on Financial Services*, 110th Cong., 1st Sess. 12-14 (2007) (testimony of John C. Dugan, Comptroller of the Currency); *Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Financial Services*, 110th Cong., 1st Sess. 87 (2007) (statement of Calvin R. Hagins, Director for Compliance Policy, OCC) (Hagins Testimony). When OCC identifies state-law requirements applicable to national banks, examiners are advised of those requirements and can take them into account in conducting examinations. GAO, *Publ'n No. 06-387, OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks* 23 (2006).

Between 2002 and July 2007, OCC examiners directed bank management to address approximately 200 issues relating to fair lending and mortgage data reporting. Hagins Testimony 110. In addition, OCC has frequently referred possible fair lending violations to the Departments of Justice and of Housing and Urban Development, and several such referrals have resulted in public enforcement actions. *Id.* at 106-108. OCC's Customer Assistance Group, which handles all consumer complaints against national banks in coordination with OCC's examination staff, has also facilitated the recovery by injured customers of tens of millions of dollars. OCC, *Report of the Ombudsman 2005-2006*, at 10 (Nov.

2007). OCC thus vigorously enforces fair lending laws against national banks.[11]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[11] Some of petitioner's amici suggest (*e.g.*, States Br. 8-14) that OCC's interpretation of Section 484 somehow contributed to the recent problems associated with subprime lending. On the contrary, the vast bulk of subprime loans were originated by state-regulated, non-bank mortgage lenders and brokers, who were subject to significantly less rigorous oversight and examination than banks. Loans by those non-depository institutions accounted for a disproportionate percentage of defaults and foreclosures, as well as the bulk of abusive and predatory lending. H.R. Rep. No. 441, 110th Cong., 1st Sess. 36 (2007); *Hearings Before the House Comm. on Financial Services*, 111th Cong., 1st Sess. (2009) (statement of John C. Dugan, Comptroller of the Currency).

APPENDIX

1. Section 484 of Title 12, United States Code, provides:

Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subsection (a) of this section, lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

2. Section 93a of Title 12, United States Code, provides:

Authority to prescribe rules and regulations

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

3. Section 7.4000 of Title 12 Code, of Federal Regulations provides, in relevant part:

Visitorial powers.

(a) *General rule.* (1) Only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, except as provided in paragraph (b) of this section. State officials may not exercise visitorial powers with respect to national banks, such as conducting examinations, inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions, except in limited circumstances authorized by federal law. However, production of a bank's records (other than non-public OCC information under 12 CFR part 4, subpart C) may be required under normal judicial procedures.

(2) For purposes of this section, visitorial powers include:

(i) Examination of a bank;

(ii) Inspection of a bank's books and records;

(iii) Regulation and supervision of activities authorized or permitted pursuant to federal banking law; and

(iv) Enforcing compliance with any applicable federal or state laws concerning those activities.

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub.L. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers

inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

* * * * *

RESPONDENT'S BRIEF

No. 08-453

Supreme Court, U.S.
FILED
MAR 25 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION L.L.C., AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE CLEARING HOUSE ASSOCIATION L.L.C.

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QUESTION PRESENTED

Was the New York State Attorney General properly enjoined from demanding records of national banks relating to their mortgage lending, and from commencing proceedings to enforce state laws against national banks based on their mortgage lending, because such demands and enforcement proceedings would constitute an exercise of "visitorial powers" prohibited by 12 U.S.C. § 484 and 12 C.F.R. § 7.4000, a regulation promulgated by the Office of the Comptroller of the Currency?

CORPORATE DISCLOSURE STATEMENT

Respondent The Clearing House Association L.L.C. is an association of leading commercial banks, some of which are national banks. The Clearing House has no parent corporation and no publicly held company owns 10% or more of its stock.

In this action the Clearing House asserted associational standing on behalf of its members, and the decree entered by the District Court specifically applies to national banks that were members of the Clearing House when the decree was entered: Bank of America, National Association; Citibank, N.A.; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. All these banks are still members of the Clearing House except LaSalle Bank National Association and Wachovia Bank, National Association.

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IN THE

Supreme Court of the United States

No. 08-453

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION L.L.C., AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE CLEARING HOUSE ASSOCIATION L.L.C.

STATEMENT

"To prevent inconsistent or intrusive state regulation from impairing the national [banking] system," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007), the National Bank Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," 12 U.S.C. § 484(a). A regulation adopted by the Comptroller of the Currency, 12 C.F.R. § 7.4000, confirms that this provision prohibits state officials from conducting regulatory investigations of banks chartered under the National Bank Act or otherwise

seeking to enforce national banks' compliance with state laws that relate to the exercise of their federally-authorized banking powers.

This case arises from an effort by petitioner, the Attorney General of New York, to commence a "preliminary inquiry" (JA173a) into how certain banks priced mortgage loans secured by New York properties in 2004. That inquiry involved extensive information requests, and the threat of subpoenas and judicial enforcement actions, against a number of national banks, including members of respondent The Clearing House Association L.L.C. JA31a-33a. The courts below agreed with the Clearing House and respondent the Office of the Comptroller of the Currency (OCC) that petitioner should be enjoined from pursuing these state enforcement proceedings.

A. The Attorney General's Authority Under New York Law

New York gives its Attorney General broad authority to investigate potential violations of state or federal law, including the power to subpoena documents and witnesses. N.Y. Exec. Law § 63(12) (reprinted at Pet. Br. App. 1a-2a). Administrative subpoenas allow him to "take proof and make a determination of the relevant facts" before commencing litigation or taking any other formal enforcement action. *Id.* To defeat an action to quash a subpoena, the Attorney General need only show that the information demanded bears a "reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *La Belle Creole Int'l, S.A. v. Attorney-General*, 176 N.E.2d 705, 707 (N.Y. 1961) (internal quotation marks omitted). The Attorney General "routinely subpoenas individuals and/or companies, requir-

ing them to produce information that is relevant to [his] investigations, and to testify under oath at subpoena hearings." JA153a.

These efforts, which may lead—often without any judicial involvement—to financial penalties, fundamental changes in the way covered entities do business, and continuing submission to oversight by the Attorney General, are part of the Attorney General's "long history of aggressive enforcement of state and federal consumer protection laws." JA153a. When directed at entities that are properly subject to regulation, supervision, and enforcement by state officials, they are perfectly permissible. The question here is whether federal law permits the Attorney General to employ the same methods to investigate the nature and propriety of lending decisions made by national banks.

B. The Mortgage-Lending Investigation

The investigation at issue here was begun in 2005 by former Attorney General Eliot Spitzer, after banks made disclosures under the federal Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810 (HMDA). The disclosures reported price data based on annual percentage rates for mortgage loans made in 2004 and certain demographic information about borrowers. *See* 12 C.F.R. §§ 203.4, 203.5. The Federal Reserve Board, which administers HMDA, and other federal agencies have cautioned that because HMDA data do not include critical factors such as credit scores, loan-to-value ratios, or consumer debt-to-income ratios, they do not by themselves establish whether any apparent disparities in loan pricing reflect legitimate differences among individual borrowers, or might instead suggest unlawful discrimination. *See, e.g.*, Federal Reserve Board, *et al.*, Joint Press Release, *Agencies Announce Updated An-*

swers To Frequently Asked Questions About HMDA Price Data (Apr. 3, 2006), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20060403a.htm (follow "Attachment" link); *see also* JA93a-94a.

In "'letters of inquiry'" (Pet. Br. 12) sent to various lenders less than three weeks after the HMDA data became available, petitioner's representatives suggested that the data were "troubling on their face." *E.g.*, JA173a. They observed that racial or ethnic disparities in loan pricing might violate state and federal antidiscrimination laws "unless legally justified" (*id.*)—as they would be if, for example, they were explained by credit history or other nondiscriminatory factors not revealed by the HMDA data. The letters indicated that petitioner had commenced a "preliminary inquiry" into the matter. *Id.*; *see also* JA168a-183a.

As an example of a law that might be implicated, the inquiry letters cited New York Executive Law § 296-a. *See, e.g.*, JA173a. That law, reprinted at Pet. Br. App. 2a-9a, prohibits discrimination in lending, but recognizes that it is not discriminatory to make decisions based on "factually supportable, objective differences in applicants' overall credit worthiness, which may include reference to such factors as current income, assets and prior credit history." *Id.* at 4a (§ 296-a(3)). On its face, the law commits enforcement principally to the state Superintendent of Banks, who may issue regulations, receive complaints, determine whether they are supported by "probable cause," conduct hearings, and find violations. *Id.* at 5a-9a (§ 296-a(6)-(11)); *see also* N.Y. Banking Law § 9-d. The Attorney General asserts parallel authority to investigate

and remedy violations of § 296-a under the general authority conferred by Executive Law § 63(12).

Petitioner's inquiry letters, written "[i]n lieu of issuing a formal subpoena," asked recipient banks to produce two categories of information. *E.g.*, JA173a. First, the letters sought HMDA data for loans or applications involving New York properties. Second, they sought substantial amounts of non-public data and materials addressing the "business considerations" underlying the pricing of all the reported loans. *E.g.*, JA173a-175a. The requests included:

- "A list and explanation of all variables that determined the APRs for 2004 HMDA reportable loans (*e.g.*, credit score, loan-to-value ratio), and any formulas or algorithms that were used to calculate such rates";
- "An extract of every computer database containing basic loan conditions (*e.g.*, term of loan, fixed or floating rate, etc.), information used to determine APRs, or any other variables for 2004 HMDA reportable loans";
- A list and explanation of every HMDA-reportable loan product; and
- "All policies and procedures concerning the circumstances under which the APR offered to a loan applicant may depart (upward or downward) from the rate determined by application of any formulas or algorithms referenced above, and all policies and procedures concerning approval and monitoring of the origination of such loans."

E.g., JA174a-175a. In later conversations, petitioner's office advised that these requests represented "only

the first stage" of the inquiry, and that petitioner "anticipated requesting substantial additional documents and information as [the] inquiry continued." JA46a.

All banks are required to disclose HMDA data to the public on request, 12 C.F.R. § 203.5(c), and the national banks that received inquiry letters produced that data as requested. JA36a, JA127a. The banks declined, however, to produce other information concerning their loan practices and specific credit decisions, on the ground that petitioner's request for such information amounted to an exercise of supervisory or "visitorial" power that the National Bank Act reserves to the Comptroller. JA36a, JA55a. One bank explained that petitioner's request for detailed lending information was typical of requests it would expect to receive in connection with examination by OCC. JA55a. Another informed OCC of petitioner's request, pursuant to OCC Advisory Letter 2002-9 (JA77a-86a), and offered to respond to any additional requests for information *from OCC* in connection with OCC's own ongoing review and analysis of the bank's HMDA data. *See* JA45a, JA77a, JA85a-86a.

In May 2005, petitioner's office told one bank that it was in "ongoing discussions" with OCC regarding "jurisdictional issues," but that petitioner would "'probably'" subpoena information the bank had not provided. JA45a-46a. In June, the office advised that petitioner had reached no agreement with the Comptroller; that the office "was committed to continuing its inquiry"; and that unless the bank provided the information, petitioner would either issue an administrative subpoena or file a state lawsuit "'within the next few days.'" JA46a.

This litigation followed.

SUMMARY OF ARGUMENT

Since 1864, the National Bank Act has prohibited state officials from exercising "visitorial powers" over national banks unless authorized to do so by federal law. 12 U.S.C. § 484. That statutory prohibition by itself bars the investigation petitioner sought to undertake into pricing decisions made by national banks in making real estate loans—a banking activity expressly authorized by federal law. *Id.* § 371(a). In addition, OCC has promulgated a regulation implementing § 484 in a way that, if valid, bars petitioner's state enforcement proceedings. That regulation was issued after full notice and comment, rests on a reasonable (indeed, correct) interpretation of the statute, falls well within Congress's delegation of authority to the Comptroller, and is entitled to deference.

I. This Court considered § 484's "visitorial powers" language just two years ago, concluding that it prohibited state officials from exercising "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 14-15 (2007). That conclusion is consistent with the text and purposes of the National Bank Act, including historical understandings of the terms that Congress used in making clear its intention to bar any "[d]iverse and duplicative superintendence of national banks' engagement in the business of banking." *Id.* at 13-14.

The point is confirmed by Congress's later consideration and amendment of what is now § 484 and related provisions. In the statute, Congress added specific exceptions allowing "visitorial" access to banks by Congress itself and by States in limited circumstances relating to state unclaimed-property or escheat laws.

12 U.S.C. § 484(a), (b). It considered proposals to create further exceptions for the specific purpose of allowing state enforcement of state consumer-protection or fair-lending laws, but it enacted no such measure. To the contrary, when Congress authorized interstate branch banking in 1994, it expressly addressed the enforcement of such state laws, but in doing so carefully preserved the historical division of enforcement authority between state officials (as to branches of state banks) and the federal Comptroller (as to branches of national banks).

This understanding of the statute makes sense, because subjecting national banks to discretionary investigation and enforcement decisions by multiple concurrent regulators would be "unduly burdensome and duplicative," *Watters*, 550 U.S. at 11, and "confusion would necessarily result," *Easton* v. *Iowa*, 188 U.S. 220, 232 (1903). Moreover, the public-prosecutor model of enforcement typified by petitioner's investigation here is incompatible with (and less effective than) the continuous and penetrating, but typically private, supervision process used by OCC.

Nothing in *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), or any other decision of this Court supports petitioner's contrary reading of § 484.

II. OCC's regulation implementing the Act's "visitorial powers" restrictions, 12 C.F.R. § 7.4000, also bars petitioner's proposed enforcement actions. The regulation was promulgated (and then amended) after public notice and comment, pursuant to the Comptroller's broad authority to prescribe rules to carry out the responsibilities of his office. It fulfills a paradigmatic agency function, reasonably resolving any ambiguity as

to the definition and scope of statutory terms. *See, e.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996). Like the regulation that defined "interest" in the National Bank Act provision at issue in *Smiley*, which displaced any otherwise applicable state regulation of the "interest" charged by national banks, OCC's regulation construes the substantive terms of § 484 and clarifies its limitations on state enforcement. As in *Smiley*, the regulation is entitled to deference so long as its implementation of the statute is reasonable, as it plainly is.

None of petitioner's arguments warrants any departure from ordinary principles of deference. There is no presumption against preemption in a case involving state efforts to regulate national banks, which have been under federal dominion since Congress first created them in 1864. For the same reason, OCC's reasonable implementation of the Act does not shift the federal-state balance, or approach the constitutional limits of Congress's authority. There is no basis for requiring Congress to speak any more plainly than it already has, in § 484 and in its broad grant of general rulemaking authority, in order to authorize the adoption of § 7.4000.

Finally, there is no force to petitioner's various arguments for denying deference because § 7.4000, like § 484, has preemptive effect. The regulation falls well within OCC's delegated rulemaking authority. It both resolves any arguable ambiguity in the statute's own terms and reflects the agency's unique expertise in the supervision of national banks. Whatever might be true of a regulation that "declares the preemptive scope of a federal statute" (Pet. Br. 48) in the sense of merely asserting the legal conclusion of preemption, *this* regulation interprets and implements the express terms of a statute that all agree has preemptive effect. Here, just

as in *Smiley*, 517 U.S. at 744, there should be no doubt that such a regulation is entitled to deference.

ARGUMENT

I. THE NATIONAL BANK ACT BROADLY PRECLUDES STATE INVESTIGATIONS OR ENFORCEMENT ACTIONS THAT RELATE TO A NATIONAL BANK'S EXERCISE OF ITS AUTHORIZED BANKING POWERS

Two years ago, in *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007), this Court explained how and why the National Bank Act's visitorial powers provision, 12 U.S.C. § 484, precludes States from subjecting national banks' mortgage lending to compliance investigations or other regulatory law enforcement:

> State laws that conditioned national banks' real estate lending on registration with the State, and subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate. Diverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the NBA was designed to prevent ....
>
> Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: "No national bank shall be subject to any visitorial powers except as authorized by Federal law ...." "Visitation," we have explained "is the act

> of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." [Citing in part 12 C.F.R. § 7.4000, the OCC regulation at issue in this case.] Michigan, therefore, cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks.

550 U.S. at 13-15 (citations and footnote omitted).

Yet, this is precisely what petitioner seeks to do. The text and history of the National Bank Act, the contemporary understanding of "visitorial powers," the obvious conflict between comprehensive federal bank regulation and the sort of state proceeding at issue here, and this Court's cases all confirm that petitioner's attempt to assert investigative and enforcement authority over national banks falls squarely within the prohibition enacted by Congress in § 484.

A. The Text And History Of § 484

1. The National Bank Act

Congress enacted the National Bank Act to establish a stable, uniform national currency and to fund the national government during the Civil War. *See, e.g.*, *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873); *see generally* Bray Hammond, *Banks and Politics in America* 718-734 (1957). The Act provided for a system of national banks that would purchase United States bonds, thus funding the treasury, and issue notes to the public, creating a national currency. *See* Act of June 3, 1864, ch. 106, §§ 5, 16, 21-23, 13 Stat. 99, 100-101, 104-106. The banks were conceived of as "instrumentalities of the federal govern-

ment," *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), "designed to be used to aid the government in the administration of an important branch of the public service," *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33 (1875). National banks' operations would not be confined to individual States, but would be interstate in scope. *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-316 (1978).

Congress placed the new national banks firmly under the "paramount authority" of the national government. *Davis*, 161 U.S. at 283. The Act established a new office of the Comptroller of the Currency within the Treasury Department, and granted the Comptroller broad authority to supervise the national banks. Act of June 3, 1864, § 1, 13 Stat. 99-100. He was directed, for example, to appoint suitable persons, "as often as shall be deemed necessary or proper, ... to make a thorough examination into all the affairs of" every national bank, including "examin[ing] any of the officers and agents thereof on oath." *Id.* § 54, 13 Stat. 116. The Act authorized the Comptroller to sue in federal court to dissolve a national banking association for certain violations of the Act. *Id.* § 53, 13 Stat. 116; *see also id.* § 55, 13 Stat. 116 (providing for penalties for certain conduct of bank officers or employees, including certain acts intended "to injure or defraud the association or any other company, body politic or corporate, or any individual person").

Concerned about possible state hostility to the new national banks, Congress included several provisions designed to protect the new system from state inter

ference.[1] Most important for present purposes, immediately after directing the Comptroller to have his examiners inquire into "all the affairs" of each national bank, the Act specified that the banks would "not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery." Act of June 3, 1864, § 54, 13 Stat. 116 (this portion now codified, as amended, at 12 U.S.C. § 484). As this Court explained in *Watters*, Congress included this provision because it "[r]ecogniz[ed] the burdens and undue duplication state controls could produce," 550 U.S. at 14, and intended "[t]o prevent inconsistent or intrusive state regulation from impairing the national system," *id.* at 11.

2. The historical understanding of "visitorial powers"

The original National Bank Act thus gave the Comptroller broad power to supervise and regulate national banks—including, but not limited to, the "thorough examination" power conferred by § 54—and then provided that the banks would not be subject to any "visitorial powers" other than those authorized by the Act itself. The sole exception was for any such powers

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[1] Section 30 of the Act, 13 Stat. 108, for example, shielded national banks from any state attempt to interfere with their ability to charge interest at the same rates allowed to state banks. Congress considered that shield "indispensable to protect [national banks] against possible unfriendly State legislation," which might otherwise "make [the banks'] existence in the State impossible." *Tiffany*, 85 U.S. (18 Wall.) at 412-413. The same provision is now codified at 12 U.S.C. § 85, and this Court upheld the Comptroller's regulatory construction of it in *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996).

"vested in the several courts of law and chancery." Act of June 3, 1864, § 54, 13 Stat. 116. Because the Act conferred no powers on state regulators or enforcement officials, they were definitively excluded from the "visitorial" role. Historical sources do not offer pellucid guidance on the contours of "visitation" in 1864, but they do confirm that the Act's exclusion of States from any visitorial role not specifically authorized by federal law precludes the sort of state-law compliance investigation and enforcement that petitioner sought to undertake in this case. Indeed, in light of the National Bank Act's broader objectives, no other reading of the "visitorial powers" provision would make sense.

Historically, "visitorial" powers over civil corporations were understood to involve more than simply private examinations into a corporation's compliance with its charter. *Cf.* Pet. Br. 24-26. The powers included investigations into, and court proceedings to correct, any abuse, irregularity, or misbehavior of the corporation, including violations of the common law. In England, the king—the government—was the "visitor" of civil corporations:

> [B]eing thus constituted by law the visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, *all misbehaviors* of this kind of corporations are inquired into and redressed, and all their controversies decided. ... [T]he law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority.

1 William Blackstone, *Commentaries on the Laws of England* 469 (1765) (Univ. of Chi. Press 1979) (emphasis added).

Petitioner relies (Br. 25) on treatises that address the private visitation of colleges to argue that visitorial powers extend only to the enforcement of the "private laws" of such colleges. It is hardly clear that visitation was so limited even in that context. *See, e.g., Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 673 (1819) (opinion of Story, J.) (citing Blackstone's discussion favorably in describing visitation of eleemosynary corporations as including the power to "inquire into, and correct *all irregularities and abuses* in such corporations" (emphasis added)). But even if it was, other authorities distinguished between private visitation of an eleemosynary corporation, such as a college, and government visitation of a civil corporation. *See, e.g.*, Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations* 659-660 (8th ed. 1866); 1 John B. Minor, *Institutes of Common and Statute Law* 573-575 (2d ed. 1876). To the extent visitation over eleemosynary corporations may have been cabined in the manner petitioner suggests, that narrow conception of the visitorial role did not apply to government visitation of civil corporations.

Thus, Blackstone explained that, while eleemosynary corporations were "bound to observe" the "rules, laws, statutes, and ordinances" given to them by their founder, civil corporations were subject to "the common law, *and* to their own by-laws, not contrary to the laws of the realm." 1 Blackstone, at 465 (emphasis added); *see also* 2 James Kent, *Commentaries on American Law* 304 (12th ed. 1873) ("[Civil corporations] are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and

abuse of their powers."). While private visitors of colleges might have been thought by some commentators to enforce only the "statutes of the college," 1 Blackstone, at 471, the government as visitor of civil corporations enforced the corporation's compliance not only with its "own by-laws" but also with "the common law," *id.* at 465, 469.

In any event, in the National Bank Act Congress created national banks, framed an entire new federal law to govern them, and prescribed in detail how and by whom they should be supervised. When it then specified, in the negative, that these federal creations "shall not be subject to any other visitorial powers than such as are authorized by this act," Act of June 3, 1864, § 54, 13 Stat. 116, it could only have intended to use the term "visitorial" in a broad sense, applying at least to any governmental enforcement of laws concerning the exercise of the banking powers conferred by the new Act. Particularly given Congress's demonstrated sensitivity to the potential for state interference, it could hardly have meant, as petitioner suggests (Br. 21-23, 26), to bar state officers from investigating national banks' compliance with their charters (whatever exactly petitioner means by that), while allowing them free access to the banks to conduct examinations or enforcement proceedings relating to, for example, the banks' lending decisions. *Cf. Tiffany*, 85 U.S. (18 Wall.) at 413 ("It could not have been intended ... to expose [national banks] to the hazard of unfriendly legislation by the States[.]").

3. This Court's construction of "visitorial powers" in *Guthrie* v. *Harkness*

This Court has addressed the "visitorial powers" provision in the National Bank Act twice: recently in

Watters, and much earlier in *Guthrie* v. *Harkness*, 199 U.S. 148 (1905). In *Guthrie*, the Court quoted a broad definition:

> "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. Burrill defines the word to mean 'inspection; superintendence; direction; regulation.'"

199 U.S. at 158. Visitors of civil corporations, the Court observed, have a power not only "to keep them within the legitimate sphere of their operations," but also "to correct all abuses of authority" and "nullify all irregular proceedings." *Id.* (internal quotation marks omitted).

In *Guthrie*, a shareholder of a national bank sought to enforce a common-law right to inspect the books of the bank in order to protect his personal interests. 199 U.S. at 149, 155. In holding that the Bank Act's exclusion of "visitorial powers" other than those conferred by the Act on the Comptroller (or vested in the courts) did not preempt the shareholder's right, the Court contrasted "the private right of the shareholder to have an examination of the business in which he is interested" with the "public right" of visitation, which rests with the government "for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers." *Id.* at 158-159. These rights having long existed in parallel to one another, the private right of inspecting how one's property was being managed was not one that the Act's provision "withholding visitorial powers" was intended to displace. *Id.* at 159; *see id.* at 153-155, 157-158.

In contrast, the *public* right of "examining into the conduct of the corporation" was a visitorial power, and the Act "made full and complete provision for [such] investigation by the Comptroller of the Currency and examiners appointed by him." 199 U.S. at 159. "It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Id.*

Guthrie holds that the private "right" and "remedy" of a shareholder "to compel the inspection of books" of a national bank does not involve visitation over the bank. 199 U.S. at 159. The Court also said, in the alternative, that "even if" the shareholder's right were deemed "visitorial," the statutory exception for powers "'vested in [the] courts of justice'" would allow a court to grant the remedy. *Id.* Because in this Court petitioner apparently contends (*e.g.*, Br. 20) that state enforcement lawsuits are categorically non-visitorial—not that they fall within the "courts of justice" exception—he argues from *Guthrie* that the exception serves only "a clarifying role" (Br. 37), ensuring that § 484 will not mistakenly be read to interfere with lawsuits that should not be viewed as visitorial in the first place.

The drafters' precise understanding of the "courts of justice" exception is not entirely clear. When Congress enacted the National Bank Act, it was understood that the government, as "visitor" of all civil corporations, frequently exercised its visitorial powers "'through the medium of the courts of justice.'" *Guthrie*, 199 U.S. at 157 (citing *Dartmouth College*, 17 U.S. (4 Wheat.) 518); *see also* 2 Kent, at 304. One role for the "courts of justice" exception may have been to pre-

serve this recognized ability of a *proper visitor* to seek whatever aid he might need from the courts.[2] Another role may have been to preserve whatever power courts needed in non-visitorial suits, such as the shareholder action in *Guthrie*, because the exercise of inherent coercive powers by a court against a corporate entity might have been deemed "visitorial" in itself.

One thing, however, is entirely clear: The "visitorial powers" provision sweeps broadly, excluding States from any visitorial role over national banks. *See, e.g., Guthrie*, 199 U.S. at 159. It follows that petitioner's apparent decision to abandon any reliance on the "courts of justice" language is well advised. Whatever else it may mean, the exception surely does not allow a State to take up the prohibited visitorial mantle simply by pursuing it through lawsuits. Any such reading would swallow § 484's plain rule of generally exclusive federal visitorial power.

4. Later congressional consideration and amendment of § 484 and related provisions

The original understanding that States may not exercise public examination or enforcement authority over national banks is confirmed by Congress's subsequent treatment of § 484 and related provisions.

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[2] Because the Act first limited the exercise of "visitorial powers" over national banks to only those "authorized by this act" (now "by Federal law"), Congress may have thought it necessary to make clear that it did not intend to displace inherent judicial powers (such as the power to compel access to premises or records) that the Comptroller might need to call upon in discharging the visitorial duties that the new Act otherwise vested exclusively in him.

a. Congress amended § 484 in 1913. Among other changes, it added a new exception:

> No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice *or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.*

Act of Dec. 23, 1913, ch. 6, § 21, 38 Stat. 251, 271-272 (emphasis added). Thus, Congress recognized that the Act's exclusion of any investigative or supervisory powers other than those it vested in the Comptroller, or otherwise specifically authorized by law, was so comprehensive that it required a statutory amendment for *Congress itself* to reclaim the power to require the production of information by a national bank.

b. Congress next amended what is now § 484 in 1982. Before that amendment, however, congressional committees twice considered modifying OCC's exclusive examination and enforcement powers to allow States to enforce certain state laws against national banks. Each time, Congress ultimately took no action.

In 1976, the Senate Banking Committee considered allegations that OCC was not adequately enforcing a new generation of state consumer-protection laws. The Committee recognized that OCC had a "unique responsibility ... to see to effective enforcement of state consumer protection laws":

> In the case of the Comptroller who traditionally has had exclusive visitorial powers with respect to national banks, considerable additional effort is needed to assure that those

> banks are in compliance with state laws applicable to them....
>
> Should evidence of inadequate enforcement of state law continue, the Congress should consider legislation to reassign the authority to enforce state laws against national banks to appropriate state officials.

Committee on Banking, Housing, and Urban Affairs, *Report on Consumer Protection and Enforcement Activities by the Three Commercial Bank Regulatory Agencies*, S. Rep. No. 94-1388, at 9 (1976). No such legislation was ever enacted.

The following year, the House Committee on Government Operations considered a similar change concerning lending disclosures. *See* Committee on Government Operations, *The Truth in Lending Act: Federal Banking Agency Enforcement and the Need for Reform*, H.R. Rep. No. 95-280 (1977). Because § 484 "appear[ed] to prohibit State regulators from entering a national bank to conduct a truth-in-lending examination," the Committee recommended an amendment to the federal Truth in Lending Act to allow States "to conduct examinations of the affairs of national banks located in such State for the purpose of enforcing the law of such State which imposes requirements substantially similar to those imposed under this chapter." *Id.* at 48. The amendment was not adopted.[3]

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[3] Recent amendments to the Truth in Lending Act could be read to permit state enforcement against national banks. *See* Omnibus Spending Act of 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524, 678-680. Legislative history, however, makes clear that this provision was not intended "to change the regulatory authority and the jurisdictional structures we now have for our Federal regulators

c. In 1982 Congress did amend § 484, clarifying that any visitorial power must be authorized by "Federal" law and adding a new subsection (b), which gives States authority to examine banks under limited circumstances and for a specific purpose:

> (b) Notwithstanding subsection (a), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 412, 96 Stat. 1469, 1521 (codified at 12 U.S.C. § 484(b)).

Everything about the 1982 amendment refutes petitioner's assertion of broad authority to investigate national banks' compliance with state fair-lending laws.

First, by enacting § 484(b) as an express exception to § 484(a), Congress necessarily recognized that state examination of a national bank's records to ensure com-

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over our depository institutions." 155 Cong. Rec. S2816 (daily ed. Mar. 5, 2009) (statement of Sen. Crapo). Rather, the "intention was to permit state attorneys general to bring civil actions only against mortgage industry participants that are not supervised by the Federal banking agencies or are not Federal credit unions." *Id.* at S2816-2817 (statement of provision's author, Sen. Dorgan). In any event, while Congress is always free to permit state enforcement of laws against national banks where it chooses to do so, such limited changes do not alter § 484's general exclusion of visitorial powers not specifically "authorized by Federal law." 12 U.S.C. § 484.

pliance with state law is the exercise of a "visitorial power[]" that § 484(a) would otherwise preclude.

Moreover, while the committee proceedings discussed above show that general concerns about displacing state enforcement authority had been brought to Congress's attention with considerable force, the 1982 amendment did not grant States broad authority to inspect banks to "ensure compliance" with all state laws. Rather, it provided for state examination "*solely* to ensure compliance with applicable State unclaimed property or escheat laws." 12 U.S.C. § 484(b) (emphasis added).

Finally, even in that narrow area, Congress limited state inspection authority to situations in which the State can first demonstrate "reasonable cause to believe that the bank has failed to comply" with state law. 12 U.S.C. § 484(b).

d. Petitioner challenges this natural reading of § 484 in part on the ground that for many years it would have left "no governmental authority [with] the power to enforce valid state laws against national banks." Pet. Br. 32. That assertion is belied, however, by related statutory provisions and their development over time.

Even at the outset, the Comptroller's broad power to examine "all the affairs" of national banks was sufficiently broad to allow him to ensure compliance with rules of conduct grounded in either federal or state law. Act of June 3, 1864, § 54, 13 Stat. 116. As a practical matter, the federal Act's "apt provisions, sanctioned by severe penalties," have always given the Comptroller ample authority to ensure the integrity of the national banking system. *Easton* v. *Iowa*, 188 U.S. 220, 230 (1903).

Of course, in 1864 Congress likely did not foresee much application of state law to the authorized banking activities of its new national banks. The National Bank Act "ha[d] in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states." *Easton*, 188 U.S. at 229. State laws that concern banking activities but are arguably not substantively preempted are a relatively recent phenomenon, and there is an anachronistic air to petitioner's concern about an enforcement gap. If, however, there was ever such a gap, over time Congress moved to meet it. The Banking Act of 1933 expressly authorized OCC to initiate removal proceedings against directors and officers of national banks for violations of "any law relating to such bank." Pub. L. No. 73-66, ch. 89, § 30, 48 Stat. 162, 193 (authority now provided at 12 U.S.C. § 1818(e)(1)). And in 1966, the Financial Institutions Supervisory Act further authorized OCC to issue cease-and-desist orders to correct violations of any "law, rule, or regulation, or any condition imposed ... by the agency." Pub. L. No. 89-695, § 202, 80 Stat. 1028, 1046 (codified at 12 U.S.C. § 1818(b)(1)). Petitioner acknowledges (Br. 7) that OCC's formal power to enforce state laws has been clear at least since that time.

e. In 1994, these two legislative strands—excluding state officials from any "visitorial" enforcement, while granting the Comptroller power to enforce any substantively applicable state law—came together. In the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338, Congress authorized interstate bank branching by both national and state-chartered banks. Sections

102 and 105 of that Act provided that interstate branches of both national and state banks would under some circumstances be subject to host-state laws regarding community reinvestment, consumer protection, and fair lending. *Id.* §§ 102(b)(1)(B) (national bank branches), 105 (state bank branches), 108 Stat. 2349-2350, 2357.[4] As to enforcement, however, the Act maintained the traditional division of visitorial responsibility between federal and state sovereigns. Section 102 provided that for branches of *national banks*, the specified state laws "shall be enforced, with respect to such branch, by the Comptroller of the Currency." *Id.* § 102(b)(1)(B), 108 Stat. 2350 (codified at 12 U.S.C. § 36(f)(1)(B)). Section 105, in contrast, placed the enforcement power as to branches of *state* banks in state bank supervisors or law-enforcement officials. *Id.* § 105, 108 Stat. 2357 (codified as amended at 12 U.S.C. § 1820(h)).

The text and structure of the 1994 Act leave no reasonable doubt that Congress granted exclusive enforcement power to OCC. *Cf.* Pet. Br. 7-9, 34-36 (suggesting power is concurrent). If there were any doubt, however, a floor exchange between Senator Riegle, the chairman of the Senate Banking Committee and sponsor of the legislation, and New York's own Senator D'Amato, the Committee's ranking minority member, would put it to rest:

> Mr. D'AMATO. I understand there is a concern that [Section 105] could be construed as

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[4] These laws do not apply to national bank branches if federal law substantively preempts them or if they discriminate against national banks. § 102(b)(1)(B) (codified at 12 U.S.C. § 36(f)(1)(A)).

> conferring on States supervisory authority over interstate branches of national banks.
>
> Mr. RIEGLE. This simply is not the case. Section 105 speaks to the supervisory authority of State banking supervisors over interstate State-chartered banks only ....
>
> ...
>
> A different section of the bill addresses supervision of interstate branches of national banks. Section 102 of the bill clarifies that under interstate banking, State-chartered banks will continue to be subject to supervision by State authorities, while national banks will remain subject to supervision by the OCC. Where a national bank is subject to State law, section 102(f) of our bill clearly spells out that those State laws "shall be enforced, with respect to such branch, by the Comptroller of the Currency."
>
> Mr. D'AMATO. I appreciate the chairman's clarification of this matter. I am in total agreement with Senator Riegle on this point.

140 Cong. Rec. 24,484 (1994). Thus, the 1994 amendments simply clarified that enforcement of state consumer-protection laws with respect to interstate branches would be subject to the same division of state and federal authority that had always applied to the banks themselves.

5. This Court's decision in *Watters*

The text, history, and precedent outlined above lead naturally to the understanding of § 484 set out by this Court in *Watters* and quoted above. Although peti-

tioner argues that *Watters* "did not address[] any question about the scope of the term 'visitorial powers' in § 484(a)" (Br. 31), that is demonstrably incorrect.

The question in *Watters* was whether the National Bank Act preempted the application of certain Michigan laws to mortgage-lending activities conducted by an operating subsidiary of a national bank. 550 U.S. at 7. The statutes at issue granted the Commissioner of the Michigan Office of Insurance and Financial Services "inspection and enforcement authority over registrants" and "authorize[d] the commissioner to take regulatory or enforcement actions against covered lenders," including filing actions in court for injunctive relief. 550 U.S. at 9-10 (citing, *inter alia*, Mich. Comp. Laws Ann. §§ 445.1661, 493.56b). In this respect, Michigan law was closely akin to the New York statutes invoked by petitioner in this case.

Relying on § 484, this Court held that the federal Act did preempt Michigan's assertion of authority under the statutes at issue. 550 U.S. at 21. The necessary first step in the Court's analysis was its recognition that the Act would "surely" preempt Michigan's application of its laws to a national bank itself. *Id.* at 10-15. "Diverse and duplicative superintendence of national banks' engagement in the business of banking," the Court explained, "is precisely what the NBA was designed to prevent." *Id.* at 13-14. In light of the visitorial powers provision, Michigan could not assert "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15. Finally, the Court held that the same preemption principles applied to an operating subsidiary of a national bank. *Id.* at 15-21. While the dissent rejected this final step, it expressly agreed that the Michigan inspection and enforcement statutes pro-

vided for "state visitorial oversight," and that through § 484 "Congress has ... preempted ... those laws purporting to lodge with state authorities visitorial power over national banks" themselves. *Id.* at 34, 35 (Stevens, J., dissenting).

Watters thus stands clearly—and, in effect, unanimously—for the proposition that, absent some specific authorization in federal law, § 484 denies States any ability to assert inspection and enforcement authority over a national bank's banking business, and specifically over mortgage-lending activities such as those at issue here.

B. Concurrent State Enforcement Is Incompatible With The Federal Regulatory System

The Court's conclusion in *Watters* makes perfect sense. The National Bank Act directs the Comptroller to examine and supervise "all the affairs" of national banks (12 U.S.C. § 481) and gives him ample power to do so, including the power to enforce any applicable state laws touching on their banking activities. Allowing officials from 50 States to exercise separate investigation and enforcement power with respect to their own laws would both burden the banks and interfere with OCC's chosen methods of regulatory supervision.

This very case illustrates the dangers of permitting multiple jurisdictions to undertake their own evaluations of a national bank's lending practices, even when applicable legal standards may suggest no conflict on their face. Already, one fundamental disagreement has emerged: The Federal Reserve Board, which is responsible for developing HMDA requirements, has said that the data by themselves cannot make out a *prima facie* case of discrimination, while petitioner has as-

serted that they can and do. *See supra* pp. 3-4; JA148a. Similarly, the Comptroller may conclude that loan-to-value ratios can provide a legitimate explanation for lending decisions; one State may argue that they cannot; and another State may accept them as relevant but accord them little weight. It is no exaggeration to say that, if petitioner's position were to prevail, a national bank could be subject to five, ten, or even more different legal analyses of when a particular loan decision passes from permissible credit evaluation to unlawful discrimination. This is exactly why, "[i]n the years since the NBA's enactment," this Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Watters*, 550 U.S. at 11.

Concurrent state enforcement is problematic even if a state law is not substantively preempted.[5] In *Easton*, this Court considered a state law that prohibited bank directors from accepting deposits when they knew the bank was insolvent. While federal law did not condone fraud, this Court clearly recognized the practi-

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[5] Petitioner repeatedly characterizes New York's fair-lending law as "nonpreempted" (*e.g.*, Pet. Br. 20), and that conclusion has been assumed for purposes of this litigation (*see, e.g.*, Pet. i). If that is correct, however, it must be because state law imposes no requirement materially more onerous than federal law addressing the same banking matters. *See, e.g., Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 33 (1996) (state law may not "prevent or significantly interfere with the national bank's exercise of its powers"). New York law is substantively preempted to the extent that either its substance or its enforcement "significantly burden[s] a national bank's own exercise of its real estate lending power" or "curtail[s] or hinder[s] a national bank's efficient exercise of any other power, incidental or enumerated under the NBA." *Watters*, 550 U.S. at 13.

cal importance of entrusting complex or discretionary enforcement questions to a single regulator. The Court explained that "[w]hether a bank is or is not actually insolvent may be, often, a question hard to answer," and that the Comptroller, in his discretion, might take a different view from the State about how that or related questions should be approached. 188 U.S. at 232. Federal law precluded state enforcement because "confusion would necessarily result from [supervisory or enforcement] control possessed and exercised by two independent authorities," which "would have to be exercised and limited by their own discretion." *Id.*

The same reasoning explains why § 484 excludes state officials from investigating or enforcing a national bank's compliance with state law even where its substantive provisions are similar or identical to those of federal law. Congress has given OCC exclusive responsibility for determining what methods of supervision and enforcement will best serve national goals.

In making those determinations, OCC has a unique vantage point. Its principal supervisory model involves intimate, ongoing examination of banks' affairs. *See* 12 C.F.R. § 4.6. Large national banks, for example, have dedicated on-site examination teams conducting continuous examinations of all aspects of the bank's operations. *See* Statement of John D. Hawke, Jr., Comptroller of the Currency, before the S. Comm. on Banking, Hous. and Urban Affairs, On Federal Preemption of State Laws, Washington, D.C., April 7, 2004, 23 O.C.C. Q.J. 69, 2004 WL 3418806, at *7. Indeed, the size of OCC's examination staff far surpasses, on a per-supervised-entity basis, the number of state examiners dedicated to supervising state financial institutions. *See id.* at *9. While OCC has a variety of formal enforcement mechanisms and punitive measures at its

disposal, it encourages examiners to identify problems early, to discuss significant issues with a bank's management and board, and to provide guidance on how the bank may bring itself into compliance where it may be falling short. *See* Comptroller of the Currency, *An Examiner's Guide to Problem Bank Identification, Rehabilitation, and Resolution* 23-24 (2001), *available at* http://www.occ.treas.gov/prbbnkgd.pdf.

By means of its comprehensive and continuous examinations, OCC gains an unparalleled understanding of banks' affairs—and an unparalleled capacity to shape their behavior. Congress has long recognized the merits of this supervisory model, and facilitated it by authorizing OCC to conduct its visitorial activities largely in private, promoting the free flow of information and a focus on prompt remediation rather than defensiveness or confrontation. *See* 5 U.S.C. § 552(b)(8). This Court, too, has recognized the effectiveness of OCC's approach. *See United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 330 (1963) ("recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings").

That approach contrasts sharply with the episodic, narrowly-focused, prosecutorial model reflected in petitioner's effort to investigate banks' mortgage-lending decisions in New York in 2004. Petitioner has nothing like OCC's comprehensive, ongoing familiarity with banks' operations, or its banking expertise. His methods look not to identifying and heading off or remediating possible problems as they might develop in the course of ongoing operations, but to reviewing records of past practice in search of evidence of previous misconduct. His methods are inherently adversarial, and his actions are typically very public, if not political.

And, as petitioner himself emphasizes (Pet. 31), his perspective is purely local. For all of these reasons, petitioner's effort to launch an investigation or other enforcement efforts here—an avowed part of his "long history of aggressive enforcement of state and federal consumer protection laws" (JA153a)—conflicts fundamentally with the approach adopted by OCC. Through § 484, Congress purposefully ensured that, in the case of national banks, it is the designated federal regulator who gets to make that choice. *See, e.g.*, *Watters*, 550 U.S. at 13-14 ("Diverse and duplicative superintendence of national banks' engagement in the business of banking ... is precisely what the NBA was designed to prevent." (citing *Easton*, 188 U.S. at 229)).[6]

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[6] Some of petitioner's *amici* focus on recent problems associated with predatory lending practices. There can be, however, no plausible suggestion that those problems stem from a lack of state enforcement authority over national banks. Federal and state officials agree that the vast majority of predatory lending originated with state-supervised non-bank mortgage firms, not banks or bank subsidiaries. *See* State Attorneys General Amicus Br. 10-11, *National Home Equity Mortgage Ass'n* v. *OTS*, No. 02-2506 (D.D.C. Mar. 21, 2003) ("[P]redatory lending abuses are largely confined to the subprime mortgage lending market and to non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries."); Comments of the National Association of Attorneys General on Responsible Alternative Mortgage Lending—Notice of Proposed Rulemaking, OTS Docket No. 2000-34, at 2 (July 7, 2000), *available at* http://files.ots.treas.gov/comments/762b5a78-fd8e-41e6-a869-2b61ba4714f0.pdf ("In the experience of state Attorneys General, predatory lending is perpetrated primarily by non-depository lenders and mortgage brokers."); Testimony of John C. Dugan, Comptroller of the Currency, before the S. Comm. on Banking, Hous., and Urban Affairs 12-13 (Mar. 19, 2009), *available at* http://www.occ.treas.gov/ftp/release/2009-24b.pdf (discussing recent study reaching similar conclusions regarding

C. This Court's Cases Do Not Recognize State Power To Enforce State Laws Affecting National Banks' Exercise Of Their Authorized Banking Powers

In the face of this textual, historical, and structural evidence of the meaning of § 484, petitioner argues (Br. 27-31) that this Court's cases demonstrate States' ability to bring enforcement actions challenging national banks' exercise of their authorized banking powers. Petitioner's cases, however, lend no support to his interpretation of § 484. To begin with, none of them even mentions the provision. In any event, none of them involved any state action remotely similar to petitioner's effort to examine national banks' lending decisions, in contemplation of action to enforce state law regulating the core banking activity of real-estate lending. As this Court viewed and resolved those cases, none of them threatened any interference either with a national bank's exercise of its federally-authorized banking powers or with the Comptroller's supervision and control of national banks.

1. Petitioner sought certiorari in part based on an alleged conflict with *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924). He argues (Br. 29) that *St. Louis* recognized a State's right to enforce any state law whose application to national banks is not substantively preempted. In *St. Louis*, however, this Court addressed two issues in a deliberate order. First, the Court held that federal law did not authorize national banks to engage in branch banking. 263 U.S.

2005-2007 period). Banks' comparatively favorable record in this regard has been attributed to the close, ongoing supervision applied to them. *See* Dugan Testimony, at 15-17.

at 656-659. Only then, "[h]aving determined that the power sought to be exercised by the bank finds no justification in any law or authority of the United States," did the Court conclude that "the way [was] open for the enforcement of the state statute." *Id.* at 660. The decision's limited holding is that a State may enforce a prohibition against a national bank activity, *if* federal law grants the bank no power to engage in that sort of activity in the first place.

That holding has no application here. Federal law expressly authorizes national banks to make mortgage loans. 12 U.S.C. § 371(a). Rather than seeking to enforce a state law prohibiting a whole category of activity (branch banking) that benefited from no federal authorization, petitioner seeks to conduct a detailed regulatory inquiry into the precise way in which national banks have been carrying on their federally-authorized banking business—deciding to approve or reject particular loan applications and to loan money to specific individuals on particular terms. And quite unlike the state *quo warranto* action in *St. Louis*, which involved a controlling legal question and no issue of fact, petitioner's inquiry here would necessarily have required a searching examination of national banks' books and records. Thus, unlike in *St. Louis*, petitioner's plan to subject national banks' real-estate lending "to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business," *Watters*, 550 U.S. at 13.

Petitioner relies especially (Br. 30) on *St. Louis*'s statement that it would be a "fallacy" to recognize a State's power to legislate on a matter but then deny it the power to enforce its law. *See* 263 U.S. at 660. Even that statement, however, he takes out of context. In the Court's opinion, that observation follows another:

Enforceability of a law follows from its substantive validity, "*unless* some controlling reason forbids" it. *Id.* (emphasis added). Here, § 484—which the *St. Louis* decision does not discuss, or even cite—limits "visitorial powers" over national banks to those granted by federal law, and petitioner's plan of examination and enforcement could not be more clearly visitorial. Those circumstances provide a "controlling reason" forbidding state enforcement.

2. The other decisions petitioner cites (Br. 27-28, 30-31) are also inapposite. The two earliest—*First National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353 (1869), and *Waite* v. *Dowley*, 94 U.S. 527 (1876)—concerned state taxation of national bank shares held by private shareholders. Congress expressly authorized such taxation in the 1864 Act and required national banks to make lists of shareholders available for inspection by "officers authorized to assess taxes under state authority." Act of June 3, 1864, §§ 40-41, 13 Stat. 111-112. In *First National Bank* and *Waite*, the Court held that States could obtain the lists, and collect the taxes that were due them, from national banks. Both exercises of state authority followed naturally from the scheme of the federal Act, and neither threatened interference with banks' exercise of authorized banking activities. *First Nat'l Bank*, 76 U.S. (9 Wall.) at 362; *Waite*, 94 U.S. at 534.

Anderson National Bank v. *Luckett*, 321 U.S. 233 (1944), concerned state enforcement of an abandoned property statute. The Court allowed enforcement, but only on the theory that the State had effectively taken over private depositors' abandoned claims against the bank and sought to enforce those private property rights. *Id.* at 248. So long as the State "demand[ed] payment of the accounts in the same way and to the

same extent that the depositors could," the Court "perceive[d] no danger of unlimited control by the state over the operations of national banking institutions." *Id.* at 249. The decision provides no authority for state compliance investigations or enforcement of state regulatory laws affecting national banks' conduct of their core banking activities. That is especially true today after Congress's 1982 enactment of § 484(b), which makes clear that state examination of a national bank to enforce compliance with unclaimed property and escheat laws is an exercise of visitorial power, albeit one that is now expressly authorized by federal law on a limited basis.[7]

3. Thus, petitioner fails to cite any decision of this Court that actually supports the sort of intrusive state enforcement, directed at core banking activities, that he sought to undertake in this case. Indeed, the only federal appellate decision to address the question be-

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[7] Petitioner also cites (Br. 28, 31) *First National Bank of Bay City* v. *Fellows ex rel. Union Trust Co.*, 244 U.S. 416 (1917), and *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969), but neither of those decisions is relevant here. In *Bay City*, the Michigan Attorney General brought a *quo warranto* action to determine whether Congress had exceeded its constitutional authority in allowing national banks to provide trust services. 244 U.S. at 421-422. The case did not involve any examination of the bank's financial decisions, inspection of its books and records, or enforcement of state law against the national bank. In *Plant City*, the Court affirmed the denial of an injunction against the Florida comptroller's request that a national bank stop certain branch banking operations. 396 U.S. at 129-130. The decision does not discuss, much less reject, any visitorial powers objection to the state comptroller's action. As in *St. Louis*, the Court rejected injunctive relief on the ground that the bank was engaging in branch banking without authority under federal law. *Id.* at 134-138; *see also Watters*, 550 U.S. at 15 n.7.

fore this case is one that petitioner acknowledges only in a footnote (Br. 32 n.14). In *National State Bank, Elizabeth, New Jersey* v. *Long*, 630 F.2d 981 (3d Cir. 1980), the Third Circuit correctly held that, although federal law did not preempt substantive application of New Jersey's anti-redlining statute to national banks, § 484 reserved any enforcement of the statute to OCC. *Id.* at 987-989. Accordingly, the one directly relevant federal precedent, issued almost 30 years ago, directly refutes petitioner's theory in this case.

II. OCC'S REGULATION IS ENTITLED TO DEFERENCE

Thus, since 1864, the National Bank Act's visitorial powers provision has expressly commanded that, subject to narrow exceptions, national banks are not subject to any state exercise of visitorial powers. 12 U.S.C. § 484. Even standing alone, that command preempts petitioner's assertion of a state-law power to investigate the books, records, and lending decisions of national banks and to bring related enforcement actions. But the statute does not stand alone.

The Comptroller has adopted a substantive regulation implementing § 484 in a way that, if valid, concededly resolves the controversy here. 12 C.F.R. § 7.4000. Petitioner asks this Court to invalidate the regulation, characterizing it as a self-delegation by federal administrators that displaces a long tradition of state enforcement and alters the constitutional balance between federal and state governments. As the court of appeals recognized, however, OCC's regulation involves nothing more—and nothing less—than a reasonable administrative construction of the terms of a federal statute that clearly has preemptive effect. There should be no doubt that such a regulation is entitled to deference. *E.g.*, *Smiley* v. *Citibank (S.D.), N.A.*, 517

U.S. 735, 743-744 (1996); *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

A. OCC's Regulation Reasonably Implements The Terms Of A Statute That Congress Has Entrusted To The Agency's Administration

"Recognizing the burdens and undue duplication state controls could produce, Congress included in the NBA an express command: 'No national bank shall be subject to any visitorial powers except as authorized by Federal law[.]'" *Watters*, 550 U.S. at 14 (quoting 12 U.S.C. § 484(a)); *see also id.* at 31-32, 35 (Stevens, J., dissenting). Understandably, over the years some questions have arisen—as in this case—about exactly what "visitorial powers" means, and how the general reservation of such powers to the Comptroller interacts with the exception provided for powers "vested in the courts of justice." *See, e.g.*, 69 Fed. Reg. 1895 (Jan. 13, 2004); 68 Fed. Reg. 6363, 6363-6364, 6367 (Feb. 7, 2003). Observing Congress's further direction "to prescribe rules and regulations to carry out the responsibilities of the office" (12 U.S.C. § 93a), since 1971 OCC has issued, and when necessary amended, a regulation addressing such questions. 12 C.F.R. § 7.4000.[8]

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[8] *See* 69 Fed. Reg. 1895 (Jan. 13, 2004) (final rule); 68 Fed. Reg. 6363 (Feb. 7, 2003) (proposed rule); 64 Fed. Reg. 60,092 (Nov. 4, 1999) (final rule); 64 Fed. Reg. 31,751 (June 14, 1999) (proposed rule); 36 Fed. Reg. 17,000 (Aug. 26, 1971); *see also* 61 Fed. Reg. 4849, 4850, 5858 (Feb. 9, 1996) (clarifying application of statutory exception relating to state escheat laws, 12 U.S.C. § 484(b)); 60 Fed. Reg. 11,924 (Mar. 3, 1995) (proposed rule); 48 Fed. Reg. 3936 (Jan. 28, 1983) (addressing enactment of § 484(b)). Contrary to petitioner's repeated suggestions, no step in this regulatory history "breaks sharply from [OCC's] own prior interpretations" (Br. 57) of § 484. Petitioner's best citation (Br. 10, 36) is to a portion of

Procedurally, § 7.4000 is "a full-dress regulation, issued by the Comptroller himself and adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley*, 517 U.S. at 741. Substantively, the regulation carries out a paradigmatic agency function by reasonably filling "gaps ... as to the scope and definition of statutory terms." *Long Island Care at Home, Ltd.* v. *Coke*, 127 S. Ct. 2339, 2346 (2007); *see also, e.g.*, *Smiley*, 517 U.S. at 740-741 (ambiguities are to be "resolved, first and foremost, by the agency" implementing a statute); *NationsBank of N.C., N.A.* v. *Variable Annuity Life Ins. Co.* 513 U.S. 251, 256-257 (1995) (deferring to statutory construction by Comptroller, as "the administrator charged with supervision of the National Bank Act"); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987) (same).

Indeed, § 7.4000 is like the definitional OCC regulation to which this Court deferred in *Smiley*. There, another provision of the National Bank Act, 12 U.S.C. § 85, allowed a national bank to charge its loan customers "interest" at whatever rate was allowed by the bank's home State, even if that rate was higher than

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the district court's opinion in this case, reporting OCC's "acknowledg[ment]" that it previously "acquiesced" in a 1999 district court decision that barred state administrative proceedings but purported to leave room for enforcement through the state courts. Pet. App. 109a (citing *First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132, 135 (D. Conn. 1999)). That observation ultimately rests on nothing more than OCC's decision not to take any further action after the decision in *Burke*, in which OCC had substantially prevailed. There was never any formal OCC "acquiesce[nce]" of the sort petitioner means to suggest. Of course, even if OCC *had* changed its position (which it has not), its current regulation would still be entitled to deference. *E.g.*, *Smiley*, 517 U.S. at 742.

would otherwise have been permitted by the laws of customers' States. 517 U.S. at 737. In the face of litigation over whether the statutory term "interest" included late fees, OCC adopted a regulation spelling out what sorts of fees it did and did not include. *Id.* at 739-741. Rejecting a series of anti-deference arguments strikingly similar to those made here, *id.* at 740-744, the Court adhered to the *Chevron* "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows," *id.* at 740-741. OCC's regulatory definition of "interest" was therefore entitled to judicial enforcement so long as it embodied any reasonable interpretation of the statute—as it plainly did. *Id.* at 744-745.

The same analysis applies here, and it leads to the same result.[9]

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[9] As a reasonable, properly-promulgated OCC construction of the National Bank Act, § 7.4000 is entitled to deference even if it modifies or displaces a court's previous interpretation of the Act, so long as the court did not "hold[] that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Thus, even were petitioner correct that this Court's decision in *St. Louis* was premised on a view of "visitorial powers" different from that reflected in § 7.4000 (*see* Pet. Br. 28-30; *but see supra* pp. 33-35), OCC's regulatory construction should now prevail. Far from "holding that the statute unambiguously forecloses the agency's interpretation," 545 U.S. at 982-983, *St. Louis* reached its result "without discussion" (Pet. Br. 28) of the statute's visitorial powers provision.

B. No Clearer Statement Of Congressional Intent Is Required

Petitioner seeks to avoid this straightforward case for deference first by arguing (Br. 42-48) that the particular regulation at issue here cannot be sustained in the absence of clearer congressional authorization. Petitioner focuses on § 7.4000's construction of § 484 to prohibit state compliance investigations or other enforcement actions when, as has been assumed in this case, a state law is not substantively preempted. He argues that the regulation works "a major alteration in the federal-state balance of authority" (Br. 43), "distorts the lines of political accountability" between federal and state governments (*id.*), triggers a general "presumption against preemption" (Br. 46), and "implicates the doctrine of constitutional avoidance" (Br. 48). None of these arguments has any purchase here.

1. To begin with, petitioner never explains what clearer statement Congress should have made. Section 484 provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). That language is broad enough to preempt the substance of state law to any necessary extent, but on its face it focuses less on substance than on "visitorial" actions—investigation, supervision, or enforcement. The parts of OCC's regulation to which petitioner objects merely define more precisely what actions by state (or other federal) officials are "visitorial," and make clear that § 484's preservation of the inherent powers of "courts of justice" cannot be construed in a way that would swallow the statute's general rule. Those are unremarkable elaborations on a basic principle set out perfectly clearly by Congress itself.

If confirmation were needed, Congress provided it in 1994 when it authorized interstate branch banking. As described above (pp. ___), in that Act Congress expressly endorsed, in the specific context of state consumer-protection and fair-lending laws, both the dichotomy between substantive validity and enforcement authority that petitioner finds so anomalous, and the clear division between OCC and state regulators of the supervision and enforcement authority over, respectively, national and state banks. *Compare* 12 U.S.C. § 36(f)(1) *with id.* § 1820(h)(3). Those provisions are perfectly consistent with § 7.4000, and not at all consistent with petitioner's theory of this case.

2. Petitioner's invocation of a "presumption against preemption" (Br. 46) is wholly out of place in a case involving state investigation and regulation of national banks. As the Court reiterated recently in *Watters*, for well over 100 years it has been clear that "'States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit.'" 550 U.S. at 11 (quoting *Farmers & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (alterations in *Watters*)). Indeed, far from applying a presumption *against* preemption, in this area the Court has "'interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law." *Id.* at 12 (quoting *Barnett Bank*, 517 U.S. at 32 (first alteration in *Watters*; emphasis added)).[10]

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[10] *See also Rose* v. *Chase Bank USA, N.A.*, 513 F.3d 1032, 1036-1037 (9th Cir. 2008) ("[T]he usual presumption against federal preemption of state law is inapplicable to federal banking regula-

Petitioner seeks to shift the relevant context by arguing that this case is about consumer protection, "not about banking regulation." Br. 46-47. That is untenable. Petitioner's demand to inspect the books and records of national banks in order to investigate their compliance with state laws governing real estate lending was unquestionably an effort to supervise and regulate the banks' exercise of banking powers conferred on them by federal law. Indeed, the Michigan laws at issue in *Watters* were "[e]nacted to protect consumers from mortgage lending abuses," 550 U.S. at 34 (Stevens, J., dissenting), yet the Court had no difficulty concluding that "real estate lending, when conducted by a national bank, is immune from state visitorial control," *id.* at 13 (citing 12 U.S.C. § 484(a)); *see also id.* (subjecting lending practices to "investigative and enforcement machinery" of States "would surely interfere with the banks' federally authorized business"). Similarly, in *Easton*, the Court specifically rejected an argument very much like petitioner's, holding that a state law prohibiting insolvent banks from receiving deposits could not be enforced against national banks as an exercise of the State's police power to protect the public from fraud. 188 U.S. at 228-229.[11]

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tion." (internal quotation marks omitted)); *National City Bank of Ind.* v. *Turnbaugh*, 463 F.3d 325, 330-331 (4th Cir. 2006) (presumption against preemption "does not exist" in area of national bank regulation).

[11] Even if a presumption against preemption were relevant here, petitioner cites no case holding that it would displace the deference owed, under *Chevron*, to an agency's reasonable construction of a statute Congress has charged it with implementing. *See, e.g., Smiley*, 517 U.S. at 743-744.

3. For the same reasons, nothing in OCC's regulation implementing § 484's "visitorial powers" rule either alters the federal-state balance or threatens to "distort[] the lines of political accountability" between the two sovereigns. Pet. Br. 43. This is hardly a case like *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), where the question was whether Congress meant, without having expressly said so, to interfere for the first time with the previously exclusive state prerogative to regulate the selection and retention of judges for state courts. On the contrary, "[n]early 200 years ago ... this Court held federal law supreme over state law with respect to national banking." *Watters*, 550 U.S. at 10. Petitioner's protestations notwithstanding, nothing in § 7.4000's modest clarifications of § 484's assignment of "visitorial powers" over national banks to federal, not state, authorities shifts the federal-state balance materially from where Congress left it when it first framed the National Bank Act in 1864.

Nor has there been, for nearly 150 years, any "commandeering" of state officers in the service of federal bank regulation or any reason for citizens to be confused about whom they should hold accountable for the supervision and regulation of national banks. *See* Pet. Br. 43-44 (invoking *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992)). The creation of a class of federally-chartered banks was a major policy innovation of the nineteenth century. Far from being "commandeered," state officials were pointedly excluded from the supervision of these new banks. And there has never been anything obscure about the distinction between national and state banks. From the beginning, for example, Congress has required national banks to proclaim themselves as such. *See* 12 U.S.C. § 22 First (federally-

chartered banks must include "national" in their names). The preclusion of state supervision or enforcement authority over national banks has always been "in full view of the public." *New York*, 505 U.S. at 168. Whether citizens are satisfied or dissatisfied with how national banks are supervised, investigated, and regulated they know which of their governments to praise or blame.

4. Finally, nothing about § 7.4000 even remotely "implicates the doctrine of constitutional avoidance." Pet. Br. 48. Petitioner nowhere questions Congress's authority to preempt the application of state law to national banks entirely. He provides no support for his passing speculation (Br. 45) that Congress might lack power to take the more limited step—seemingly *more accommodating* of state interests—of leaving state law substantively in force to some extent but requiring that, in the case of these federal instrumentalities, any compliance investigation or similar enforcement be undertaken only by federal officials.[12] Congress's decision to

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[12] In the sensitive area of inter-governmental relations, limitations on the means otherwise available to a given sovereign to enforce its substantively valid laws are not as unusual as petitioner suggests. Diplomatic or foreign sovereign immunity, for example, may preclude States from enforcing many valid laws against particular persons or entities. *See* 22 U.S.C. § 254d; 28 U.S.C. § 1604. Federal immunity may preclude enforcement of otherwise valid state law against federal officers or instrumentalities or on federal land. *See, e.g.*, *Johnson* v. *Maryland*, 254 U.S. 51, 55-57 (1920); *In re Neagle*, 135 U.S. 1, 6, 60-62, 72-76 (1890); *Tarble's Case*, 80 U.S. (13 Wall.) 397, 410-412 (1872). Tribal immunity may prevent resort to the most efficient means of enforcing valid state tax laws, *see Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) ("Oklahoma complains that, in effect, [the Court's] decisions ... give them a right without any remedy."), or preclude the judicial enforce-

prohibit States from exercising "visitorial powers" against national banks is clear, 12 U.S.C. § 484, as is its constitutional authority to create and regulate national banks, *see, e.g.*, *Watters*, 550 U.S. at 22. Neither § 484 itself nor OCC's reasonable interpretation of it in § 7.4000 reaches anywhere near "the outer limits of Congress' power." *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).

C. The Preemptive Reach Of § 484 And OCC's Implementing Regulation Do Not Limit *Chevron* Deference

Petitioner also argues that § 7.4000 "is not eligible for *Chevron* deference because it declares the preemptive scope of a federal statute." Br. 48; *see* Br. 48-57. That argument is both inapposite and unpersuasive.

1. Section 7.4000 does not "declare[] the preemptive scope of a federal statute" (Br. 48) in the way petitioner seeks to suggest. Petitioner invokes the dissent in *Watters*, which argued for "'something less than *Chevron* deference'" when "'an agency purports to decide the scope of federal pre-emption.'" Br. 49 (quoting 550 U.S. at 41 (Stevens, J., dissenting)). But both the majority opinion and the dissent in *Watters* agreed that, in the case of national banks themselves (as opposed to the operating subsidiaries at issue in that case), preclusion of regulatory visitation by state offi-

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ment of otherwise valid state-law obligations, *see Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 754-756 (1998). And *state* immunity, of course, has been held to limit the means available to enforce valid *federal* laws. *See, e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 754-757 (1999).

cials is the "express command" of the statute itself. 550 U.S. at 14; *id.* at 31-32, 35 (Stevens, J., dissenting). When § 7.4000 elaborates on the statute's prescription that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, [or] vested in the courts of justice," 12 U.S.C. § 484(a), it is "implement[ing] [that] statutory command," 550 U.S. at 44 (Stevens, J., dissenting). The regulation here is not one "whose sole purpose was to pre-empt state law," *id.*—or one that simply declares "an agency's *conclusion* that state law is pre-empted," *Wyeth* v. *Levine*, No. 06-1249, 2009 WL 529172, at *11 (Mar. 4, 2009).

In this respect, too, the present case is like *Smiley*. *See supra* pp. 39-40. There, OCC's regulatory elaboration on the statutory term "interest" in effect determined the precise preemptive scope of 12 U.S.C. § 85, because that provision displaces certain state limitations on "interest." 517 U.S. at 737, 739-740. Nonetheless, the Court accorded OCC's regulation full *Chevron* deference, unanimously rejecting Smiley's argument that "*no* Comptroller interpretation of § 85 is entitled to deference, because § 85 is a provision that pre-empts state law." *Id.* at 743. That argument, the Court explained, "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." *Id.* at 744. Whatever rule might be appropriate if the question were whether a statute has preemptive effect, ordinary deference was due to OCC's regulation construing operative terms in statute that clearly does. *Id.*

Petitioner's only answer to *Smiley* is his repeated assertion that § 7.4000 is a "declaration[] about ... preemptive scope." Br. 52; *see also, e.g.*, Br. 53-54. He offers, however, no basis for distinguishing OCC's interpretation of "visitorial powers" from its interpretation

of "interest." Here, as in *Smiley*, "there is no doubt that [the statute itself] pre-empts state law." 517 U.S. at 744. Here, as in *Smiley*, OCC's regulation addresses "the substantive ... *meaning*" of the federal law. *Id.* And here, as in *Smiley*, that regulation is entitled to full deference. Nothing in that conventional application of *Chevron* threatens to "eviscerate the courts' traditional role in maintaining the constitutional balance of federal and state authority." Pet. Br. 49.

2. Petitioner also argues that the Court should not defer to § 7.4000 because *Chevron* rests on a presumption of agency expertise, and agencies are not experts on "broad structural questions of federalism." Br. 49. That argument is doubly misguided in this case.

First, as noted above, this Court has repeatedly explained that *Chevron* rests not only on agency expertise but on "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley*, 517 U.S. at 740-741; *see also, e.g.*, *Long Island Care at Home*, 127 S. Ct. at 2345-2346; *Chevron*, 467 U.S. at 843. That gap-filling authority is essential to any agency's ability to discharge the responsibilities delegated to it by Congress. Here, there is no basis for concluding that Congress created OCC, charged it with exercising exclusive "visitorial powers" over national banks, 12 U.S.C. § 484, and gave it authority "to prescribe rules and regulations to carry out the responsibilities of the office," *id.* § 93a, but withheld from that regulatory delegation the usual power to adopt reasonable implementations of statutory terms.

Second, although it is not clear why an agency should ever be faulted for engaging in "traditional legal analysis" when promulgating rules (Pet. Br. 50), petitioner's stated concern that agencies are ill-suited to interpret and apply judicial doctrines governing preemption is especially inapposite in this case. The legal analysis in OCC's rulemakings mostly discusses not principles of preemption, but rather the historical understanding of "visitorial powers." *See* 69 Fed. Reg. at 1896-1902; 68 Fed. Reg. at 6367-6370; 64 Fed. Reg. at 60,094-60,095; 64 Fed. Reg. at 31,751. That makes sense, because the issue is not a "broad structural question[]" (Pet. Br. 49) about whether Congress intended to preempt; clearly it did. The question is a far narrower one of how § 484's treatment of "visitorial powers" relates to OCC's ability to fulfill its statutory responsibilities. On that issue, OCC's analysis clearly does reflect relevant expertise—the agency's hands-on experience, its understanding of how the national banking system works, and its informed judgments as to how best to effectuate Congress's express policy of uniform and cohesive supervision of national banks. *See, e.g.*, Pet. App. 94a-96a ("OCC's construction of the statutory text was informed by its experience as the national banks' primary regulator."); 69 Fed. Reg. at 1895-1896, 1903, 1904; 68 Fed. Reg. at 6367-6369; 64 Fed. Reg. at 60,094-60,095; *cf.* JA120a-121a (exhibit to OCC Complaint summarizing policy rationales underlying § 7.4000).

3. Petitioner half-heartedly suggests (Br. 50-52) that OCC's regulatory implementation of § 484 might be disregarded (indeed, invalidated) because of "agency self-interest" (Br. 50). As he acknowledges (*id.*), however, this Court has never embraced any such rule. *See Mississippi Power & Light Co.* v. *Mississippi ex rel.*

Moore, 487 U.S. 354, 381-382 (1988) (Scalia, J., concurring in the judgment) (cataloguing cases in which Court has deferred to agency interpretations of statutes defining agency authority or jurisdiction). And if the advantages of having a single federal regulator exercise all visitorial powers provide an incentive to organize as a national bank, *see* Pet. Br. 51-52, that would be no more than Congress itself contemplated when it first framed the National Bank Act more than 140 years ago. *See, e.g.*, Hammond, at 728, 732-733; *Tiffany*, 85 U.S. (18 Wall.) at 413 ("much has been done to insure [national banks'] taking the place of State banks").

4. Relying again on his characterization of § 7.4000 as "an agency declaration about preemption" (Br. 53), petitioner argues (Br. 53-55) that the regulation is not within Congress's grant of regulatory authority to OCC in 12 U.S.C. § 93a (Comptroller "authorized to prescribe rules and regulations to carry out the responsibilities of the office"), or at least should be subject to some form of "heightened scrutiny" (Br. 53). He offers, however, no cogent support for these positions.

To begin with, as petitioner acknowledges (Br. 53 n.22), the Court has routinely deferred to properly promulgated agency regulations that have preemptive effect. The cases do not refuse deference, or vary the standards for according it, where agencies have acted under broad grants of rulemaking authority, rather than pursuant to special delegations or statutory language manifesting specific preemptive intent. *See City of New York* v. *FCC*, 486 U.S. 57, 64 (1988) (preemptive regulation's force "does not depend on express congressional authorization to displace state law" (internal quotation marks omitted)); *see also id.* at 63-70; *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699-700 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458

U.S. 141, 153-154 (1982); *United States* v. *Shimer*, 367 U.S. 374, 380-383 (1961). Even if § 7.4000 were supported only by Congress's broad delegation and the agency's own authority, there would be no basis for denying it full deference.

That point is academic here, however, given the actual nature of and basis for the regulation. Petitioner's assertions that § 7.4000 is "unconnected to any substantive regulation" (Br. 53 n.22) and "does not address any statutory provision that the agency is charged to enforce" (Br. 55) are perplexing. OCC's "visitorial powers" rule *is* a "substantive regulation," implementing § 484; and § 484 clearly commits to OCC, subject to limited express exceptions, all "visitorial powers" over national banks. Petitioner would limit those powers to "monitoring ... fiscal soundness and enforcing the NBA's banking laws" (Br. 54; *see* Br. 55), but he cites no authority for that atextual proposition. *Cf.*, *e.g.*, 12 U.S.C. § 481 ("make a thorough examination of *all the affairs* of the bank") (emphasis added). In any event, arguments about the proper scope of "visitorial powers" speak to the substance of the regulation, not to whether it addresses a subject falling generally within OCC's statutory responsibilities (and thus within its delegated rulemaking power). OCC's rulemakings also explain at length how § 7.4000 serves the policy of uniform federal supervision of national banks, and thus relates directly to the OCC's implementation of its statutory responsibilities. *See* 64 Fed. Reg. at 60,094-60,095; 68 Fed. Reg. at 6366-6369; 69 Fed. Reg. at 1895-1896.

5. Finally, as petitioner all but acknowledges (Br. 55-56), Congress's 1994 statutory amendments relating to branch banking demonstrate its understanding that OCC has the authority to issue even "opinion letter[s] or interpretive rule[s]" that *do* simply "conclude[] that

Federal law preempts the application to a national bank of any State law" of the consumer-protection sort at issue here. 12 U.S.C. § 43(a). The amendments require that the agency use notice-and-comment procedures, which would normally be required only for legislative rules having the force and effect of law. *Id.*; *see* 5 U.S.C. § 553(b). The power they recognize, however, *a fortiori* confirms OCC's ability to frame and promulgate, using appropriate procedures, the "full-dress regulation" at issue here. *See Smiley*, 517 U.S. at 741.

That regulation does not simply declare conclusions about preemption, but reasonably implements the specific terms of a clearly preemptive statutory provision that the Comptroller is charged with administering. It is entitled to binding effect. And petitioner does not contest that, if the regulation is given effect, his demand to examine the books and records of national banks in order to investigate and enforce their compliance with state laws governing real-estate lending is an unlawful exercise of "visitorial powers" denied to the States by § 484.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents make the remarkable claim that national banks are generally immune from state law enforcement, even where they are subject to state laws. But as we explained in our opening brief, when Congress reserved to the Comptroller the visitorial power over national banks in what is now 12 U.S.C. § 484, Congress did not prohibit all state law enforcement activity against national banks. Instead, Congress created a federal supervisory regime for the national banks, and prohibited the States only from asserting a rival supervisory authority. OCC's regulation purporting to preempt state law enforcement is not entitled to deference because Congress did not delegate to OCC the power to make that decision.

A. Section 484 Does Not Prohibit States From Enforcing Valid State Laws Against National Banks

1. This Court has repeatedly upheld States' authority to enforce their valid and nonpreempted laws against national banks. Indeed, the Court has noted more than once that if a State's substantive law governs a national bank's activities, it follows inexorably that the State is entitled to enforce it. Respondents' efforts to distinguish those cases are unpersuasive.

For example, in *National Bank v. Kentucky*, 76 U.S. 353 (1869), and *Waite v. Dowley*, 94 U.S. 527 (1877), this Court upheld the States' authority to tax shares of bank stock and to require national banks to take specific actions to assist in that process. Respondents suggest that these cases are inapposite because the States' authority to impose the taxes in question was clear, and

the States' authority to collect the taxes followed from their authority to impose them. Brief for Respondent Office of the Comptroller of the Currency ("OCC") 51; Brief for Respondent The Clearing House Ass'n L.L.C. ("CH") 35. Similarly, OCC (at 51-52) argues that *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), which upheld a state attorney general's authority to sue a national bank in state court to enforce a state-law restriction on provision of trust services, is limited to situations where federal law expressly conditions a national bank's power on compliance with state law. But in all three cases, the Court held that a State's power to impose obligations implies the power to enforce them, which is precisely what respondents deny here.

As we have explained (Pet. Br. 28-30), this Court was especially emphatic about the connection between the power to make laws and the power to enforce them in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924). Respondents seek to distinguish *St. Louis* on the ground that it concerned "an activity (branch banking) that was not authorized for national banks at that time" (OCC 51; *see* CH 34), but that distinction cannot withstand analysis. The relevant "activity" is providing banking services. Rules on branching – including questions such as whether an armored car, *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), or an automated teller machine, 12 U.S.C. § 36(j), is a branch – simply regulate the place and manner of banks' conduct, just as the law regulates many other aspects of banks' operations.

The notion that *St. Louis* should be understood as a case only about the forbidden "activity of branching"

is stretched to the breaking point by respondents' effort to extend it to *Dickinson*. In *Dickinson*, this Court upheld the authority of a state comptroller to prohibit a national bank from using an armored messenger service and a remote depository location, on the ground that these arrangements were branches prohibited by state law. Respondents suggest that, as in *St. Louis*, the State's enforcement authority in *Dickinson* was upheld because it dealt with the unauthorized activity of branching. *See* OCC 52; CH 36 n.7. But by 1969, national banks were no longer forbidden to branch; they were permitted to branch within their home States to the extent permitted by state law. *Dickinson*, 396 U.S. at 130-32. Thus, when *Dickinson* upheld the authority of the State to enforce state law, the ruling could not have rested on the ground that the state law concerned an activity categorically prohibited by federal law. Instead, the Court concluded, notwithstanding OCC's contrary view, that because federal law treated the armored car as a "branch," state enforcement of state law could not conflict or interfere with federal law. *Id.* at 138.

Whether and where banks may establish branches, and the proper definition of a branch, has been one of the most hotly contested issues in American banking regulation.[1] In this area as in others, a State cannot

1. The history of bank regulation in American reflects a slow expansion of authority to establish branch banks. For an overview, see R. Carnell, J. Macey, & G. Miller, *The Law of Banking & Financial Institutions* 10-27 (4th ed. 2009). In 1864, the Comptroller construed federal law as banning branching; state laws on the subject varied. *Id.* at 10. In 1927 and 1933 enactments, Congress permitted limited intrastate branching (Cont'd)

impose a requirement on a national bank that conflicts with federal law. For that reason, the Court in *St. Louis* considered whether any federal law conflicted with the state law that Missouri sought to enforce. The absence of such a law was relevant not because it carved out an "activity" outside the scope of federal regulation and therefore subject to state law enforcement but because it established that state law was not preempted, given that federal and state law were consistent on the subject of branching.

So too here, state and federal law are consistent: both contain the same prohibition on lending discrimination. Therefore, state law is not preempted and may be enforced by the State. Discriminatory lending is no more permissible for national banks today than branch banking was in the 1920s. *See, e.g.*, 15 U.S.C. § 1691 *et seq.* (Equal Credit Opportunities Act [ECOA]).

OCC virtually concedes (at 53) that its theory is inconsistent with the holding of *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), which upheld the State's power to enforce a state escheat law with respect to accounts held in national banks. Kentucky enforced the law in question by taking over abandoned bank accounts and requiring banks to file periodic reports of

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(Cont'd)
by national banks, to the extent permitted by state law. McFadden Act of 1927, Pub. L. No. 69-639, § 7(c), 44 Stat. 1224, 1228; Glass-Steagall Act of 1933, Pub. L. No. 73-66, § 23, 48 Stat. 162, 189-190. In 1994, Congress allowed interstate branching. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, § 101, 108 Stat. 2338, 2339.

inactive accounts. *Id.* at 252-53. That Congress subsequently enacted 12 U.S.C. § 484(b) to expressly authorize States to examine national banks for compliance with escheat laws does not, as OCC suggests, remove the significance of *Anderson*. Instead, it demonstrates that Congress approved the ruling, clarifying that those targeted state inspections of national bank records are compatible with the national banking system. In *Anderson*, as in *St. Louis*, *Dickinson*, and the other cases just discussed, the Court concluded that the state laws were not substantively preempted because they did not significantly burden the banks' activities. *See Anderson*, 321 U.S. at 250 (contrasting Kentucky's law with other state escheat laws determined to be unenforceable against national banks, as in *First National Bank of San Jose v. California*, 262 U.S. 366, 369 (1923)). Once the law was found not to be preempted, it followed inevitably that the State was entitled to enforce it.

By contrast, when a State has been barred from enforcing its law against a national bank, it has always been because the substantive law itself was preempted, and not because the State was barred from enforcing a valid state law. For example in *Easton v. Iowa*, 188 U.S. 220 (1903), this Court found preempted a state law making it a crime for a bank officer to receive a deposit knowing that the bank was insolvent. The Court did not find that the state law prohibition was valid but state criminal enforcement was barred; rather, it noted that "the validity of the mandatory and of the penal parts of

the statute must stand or fall together," *id.* at 228, and found the statute preempted in its entirety.[2]

OCC suggests that it is irrelevant that the States have never before been barred from applying nonpreempted state law because in previous cases the banks have not raised § 484 as an objection to state enforcement of valid state law. OCC 51-52. But national banks are not bashful litigants. Their failure to invoke § 484, at a time when the term "visitorial powers" was far more familiar to courts and attorneys than it is today, confirms that OCC's recent interpretation of the term is off the mark. Indeed, in *St. Louis*, the bank expressly conceded that if the state branching law were not preempted, the State would have power to enforce it: "We doubt not that, if the state has the power to enact such a statute, it has plenary power to enforce it. A condition of sovereignty which will admit of the enactment, but not the enforcement, of legislation is anomalous to the degree of impossibility." *First Nat'l Bank in St. Louis v. Missouri*, No. 23-252, Substituted Brief and Argument for Plaintiff in Error, at 49.

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2. So too this Court rested on substantive preemption, without considering enforcement preemption, in *First National Bank of San Jose*, 262 U.S. 366 (state escheat law); *Franklin National Bank of Franklin Square v. New York*, 347 U.S. 373 (1954) (state restriction on naming of banks); *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299 (1978) (state effort to apply its interest rate limitation to out-of-state bank's credit card solicitation program); and *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996) (state restriction on bank's sale of insurance).

Thus, the idea that § 484 precludes state enforcement of valid state laws seems not to have occurred to litigants or courts from 1864, when § 484 was originally enacted, until well more than a century later, when OCC began advancing its expansive theory of enforcement preemption. The absence of that theory from the briefs and opinions of the time is powerful evidence that it was not incorporated in the statute by the term "visitorial powers."

2. This Court has only twice before discussed the visitorial powers provision of the National Bank Act (NBA), in *Guthrie v. Harkness*, 199 U.S. 148 (1905), and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). In each case, its discussion has been consistent with the understanding that ordinary law enforcement does not require the exercise of visitorial power.

Respondents contend that (1) in *Watters*, this Court held that the entire Michigan statutory scheme regulating mortgage lenders was an exercise of prohibited visitorial powers, (2) because the scheme included lawsuits to enforce state laws, the Court held that such suits are inherently visitorial, and (3) the Michigan statutory scheme was sufficiently similar to New York's lending discrimination statutes to establish that the New York statutes too are visitorial. OCC 46; CH 27. Each step of that analysis is incorrect.

First, *Watters* did not adjudicate a contested issue about the visitorial character of the Michigan scheme. The regime was indisputably visitorial, defined by a complex of state laws authorizing active and general supervision of financial activities by a state

commissioner. Michigan expressly vested the commissioner with "general supervision and control" over licensed entities, including the power to audit the entity's books and records and to deny or revoke its ability to operate in Michigan. 550 U.S. at 8-9.

Second, because the scheme as a whole was indisputably visitorial, and the contested issue was whether certain state-incorporated bank subsidiaries were entitled to the same protection from state visitorial powers as the banks themselves, the Court had no occasion to consider whether any particular elements of the scheme taken alone would constitute the exercise of visitorial power. Nothing in *Watters* suggests that a state attorney general's lawsuit to enforce a nonpreempted state law would be a prohibited exercise of visitorial power,[3] and the unbroken line of cases discussed above upholding the power to bring such lawsuits shows that it would not.

Third, the powers authorized by the Michigan scheme are far broader than, and different from, the powers asserted by the New York Attorney General here. The Michigan scheme subjected regulated corporations, in that case bank subsidiaries, to "audits and surveillance under rival oversight regimes," with judicial enforcement being merely one small aspect of a regime characterized by ongoing oversight, supervision,

3. OCC is mistaken in suggesting (at 45-46) that *Watters* also found preempted certain provisions in Michigan's statutes authorizing the state attorney general to sue for injunctive relief. This Court's decision addressed only the powers of the state commissioner, and did not mention or discuss the state attorney general or his enforcement powers.

and administrative enforcement. 550 U.S. at 21. In this case, by contrast, the Attorney General's proposed law enforcement is not part of any "oversight regime[]," but rather a targeted law enforcement action, more like a criminal prosecution or a private civil damages action than like the ongoing supervision that characterizes visitation.

Nor does *Guthrie* support respondents. They rely heavily on *Guthrie*, notwithstanding that the case held that the shareholder's demand for inspection at issue was *not* visitation, because this Court reasoned that "visitation" did not include actions by a private shareholder. *See* OCC 43-44; CH 16-19. But this Court never implied that all government enforcement is visitorial, or that the private or public nature of an act is the fault line that separates visitation from other forms of enforcement. Quite to the contrary, as OCC acknowledges (at 43), *Guthrie*'s survey of definitions of "visitation" emphasized supervision of corporate governance and general oversight of the charter or law of a corporation's creation.

3. Respondents miss the point in arguing that at common law, having visitorial authority over a corporation permitted a wide range of government action that in some respects resembles modern state law enforcement. OCC 34; CH 14-15. The question is not whether visitorial power might authorize (among many other powers) an enforcement action such as this one. Rather, the question is whether state enforcement against a national bank of state law of general applicability *necessarily* constitutes a forbidden exercise of visitorial powers. The antidiscrimination action at

issue here is not, fundamentally, an exercise of visitorial power, whether or not visitorial power could also be marshaled to similar effect; rather, it is fundamentally an exercise of the police power.

This point is demonstrated by the fact that the absence of visitorial powers has never been thought to restrict a State's enforcement of generally applicable laws against a foreign corporation, *i.e.*, a corporation chartered in another State. While a State possesses no visitorial powers over a foreign corporation doing business within its borders, the host State may nonetheless enforce its laws against such foreign corporations in the exercise of its police powers. Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 59 Harv. L. Rev. 369, 389 (1936). Like a foreign corporation, a national bank is subject to general law enforcement but not the exercise of visitorial powers by a State, which of course did not charter the bank.[4]

Merely because a visitor is empowered to take a certain action – such as looking at a bank record or filing a complaint against a bank in court – does not mean

4. Respondents exaggerate the differences between visitation of eleemosynary corporations and visitation of civil corporations. OCC 29-30, CH 15-16. Eleemosynary corporations historically had a private visitor, while civil corporations were visited by the chartering sovereign. *See, e.g.*, 1 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* 581, § 476 (2d ed. 1908). But in both cases the visitorial power derived from the act of founding the corporation, and was not equivalent to the general police power. Pound, *supra*, 59 Harv. L. Rev. at 375; Thompson, *supra*, at 580-81, §§ 475-476.

that any attempt by another official to perform a similar act is necessarily visitorial. For instance, reviewing bank records as part of routine surveillance through bank examinations may be visitorial. *See, e.g., United States v. Phila. Nat'l Bank*, 374 U.S. 321, 329-30 (1963) (describing "the broad visitatorial power of federal bank examiners" as the authority to make "frequent and intensive" examinations into all of banks' affairs, and to require that "banks . . . furnish detailed periodic reports of their operations to the supervisory agencies," so as to "maintain virtually a day-to-day surveillance" of the banking system). But reviewing bank records produced in ordinary civil discovery is not. *See* 12 C.F.R. § 7.4000(a) (acknowledging that production of records may be required "under normal judicial procedures"); *accord* OCC Interpretive Ltr. No. 122, 1979 OCC Ltr. LEXIS 11 (Aug. 1, 1979); OCC Interpretive Ltr. No. 93, 1979 OCC Ltr. LEXIS 47 (Apr. 2, 1979). Similarly, although filing a lawsuit to hold a national bank to the charter or law of its creation may require the exercise of visitorial power, filing a lawsuit to remedy violations of generally applicable state law does not. *See St. Louis*, 263 U.S. at 660.

Here, the Attorney General is not attempting to exercise supervisory power over national banks, but rather to investigate and prosecute specific suspected violations of generally applicable state law. New York's Human Rights Law (HRL), N.Y. Executive Law §§ 290-301, prohibits discrimination in a wide range of activities, including employment, housing, public accommodations,

education, and, relevant here, the extension of credit.[5] The Attorney General seeks to exercise his power under New York Executive Law § 63(12) to sue for damages, penalties, and injunctive relief based on alleged violations of New York's fair-lending law in the making of loans related to New York properties during 2004, and also seeks to obtain relevant information about those loans in contemplation of such a suit. Clearing House itself contrasts the Attorney General's "prosecutorial" approach under § 63(12) and the Comptroller's "supervisory model," observing that the Attorney General's enforcement is "episodic, narrowly-focused," and targeted at responding to "previous misconduct," whereas the Comptroller conducts "comprehensive and continuous examinations" focused on "heading off or remediating possible problems as they might develop." CH 30-31. This well describes an essential difference between visitation and ordinary law enforcement.

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5. Respondents incorrectly suggest that enforcement of New York's fair-lending law lies principally with the New York State Banking Department. OCC 48; CH 4. The fair-lending law, like the other antidiscrimination laws in New York's HRL, may be enforced by the Attorney General or administratively by the New York State Division of Human Rights (DHR). N.Y. Executive Law § 297(1). Alternatively, an individual or the Attorney General may sue in state court. *Id.* §§ 63(12), 297(9). As to state-licensed or -supervised creditors only, the individual also has the option of filing a complaint with the Banking Department, *id.* § 296-a(6), but that is not the principal mode of enforcement. Moreover, the DHR has issued a substantive regulation construing the fair-lending law, 9 N.Y.C.R.R. § 466.8, while the Banking Department has not done so.

4. Respondents contend that the statutory exceptions to § 484(a) support their interpretation of the statute. OCC 35-39; CH 20, 22-23. But we have shown (Pet. Br. 36-39 & n.17), and respondents do not rebut, that these provisions were enacted to resolve disputes about the meaning of § 484(a). The existence of the exceptions says more about national banks' historic obstructionism than it does about the scope of § 484(a).

Nor is respondents' position supported by two congressional committee reports from the 1970s, cited by Clearing House (at 20-21). *See* Comm. on Banking, Housing, & Urban Affairs, *Report on Consumer Protection Enforcement Activities by the Three Commercial Bank Regulatory Agencies*, S. Rep. No. 94-1388, (1976); Comm. on Government Operations, *The Truth in Lending Act: Federal Banking Agency Enforcement and the Need for Statutory Reform*, H.R. Rep. No. 95-280, at 48 (1977). Not only are committee reports that are unconnected to any enacted legislation notoriously unreliable as a guide to the meaning of any law, but these reports, even if reliable, would not support the claim that States lack, and always have lacked, any authority to enforce any state consumer protection law.

The 1976 report does not, as Clearing House contends (at 20-21), indicate that a statutory amendment would be required to give States a role in enforcing state consumer protection laws against national banks. To the contrary, the report recognized that States already had an enforcement role, and criticized the Comptroller for obstructing that role by "refus[ing] to allow state officials access to information needed to determine compliance" with state consumer protection laws. *Report on*

Consumer Protection, at 9. In the event of continued poor enforcement of consumer protection laws by OCC, the report recommended that OCC's assigned supervisory role should be reassigned to state banking authorities. *Id.* The report did not address ordinary law enforcement at all.

The 1977 report expressly addressed only examination authority and not enforcement actions. It noted first that § 484 limits state examinations of national banks, and then recommended that federal law be amended to specifically authorize States "to conduct examinations of the affairs of national banks . . . for the purpose" of enforcing state truth-in-lending laws. *The Truth in Lending Act*, at 48.

5. As we have shown (Pet. Br. 32-33), respondents' interpretation of § 484 implies that Congress intended that no government would have the power to enforce valid state laws against national banks for the first century after the NBA's enactment, until OCC was given such enforcement authority in 1966.

Clearing House counters (at 24) that Congress had little reason to expect that much state law would apply to national banks. But just a few years after the NBA's passage, this Court made clear that state law generally applies to national banks, and that preemption of state law is the exception, not the rule. *See, e.g., Kentucky*, 76 U.S. at 362; *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); *St. Louis*, 263 U.S. at 656; *see also Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (collecting cases).

Respondents now suggest that OCC has always had power to enforce state law (OCC 53, CH 23), even though they previously acknowledged that OCC lacked such power until 1966 (CH Brief in Opp. 14 n.10; *see Bank Activities & Operations*, 69 Fed. Reg. 1895, 1899-1900 & n.40 (2004)). OCC argues that while it initially lacked any "formal" authority to enforce state law, it nevertheless could have brought about compliance with state law through "informal" means. OCC 53. But as this Court has recognized, the effectiveness of such informal persuasion depends on the existence of formal sanctions to back it up. *See Philadelphia Nat'l Bank*, 374 U.S. at 330.

Respondents also cite a 1933 statute that authorized the Comptroller to refer matters to the Federal Reserve Board for removal of officers or directors for violations of "any law relating to such bank." OCC 54 (citing Glass-Steagall, § 30, 48 Stat. at 193); CH 24 (same). Even assuming that this provision encompassed violations of state law, at best it would only slightly reduce the length of the enforcement gap entailed by respondents' position.

6. Respondents contend that 12 U.S.C. § 36(f)(1)(B), enacted in 1994 as part of the Riegle-Neal amendments, shows that States cannot enforce state laws against national banks. They argue that § 36(f)(1)(B) demonstrates that States lacked enforcement power under preexisting law. CH 24-26; OCC 46-48.

As we has shown, however, § 36(f)(1)(B) does not support respondents. Pet. Br. 34-35. The provision states that applicable state consumer protection and

fair-lending laws, among other laws, "shall be enforced, with respect to [an out-of-state branch of a national bank], by the Comptroller of the Currency." The provision does not purport to exclude all state enforcement authority.[6] The effect of § 36(f)(1)(B) is to clarify that *supervision* of out-of-state branches of national banks remains with OCC, notwithstanding the fact that, under § 36(f)(1)(A), such branches are generally subject to state consumer protection, fair-lending, and certain other laws as if they were branches of host state banks. The provision does not address ordinary law enforcement outside the supervisory process.

Prior to enactment of Riegle-Neal, bank branching was governed by the McFadden Act, which incorporated state-law branching standards, enforceable by the States. *See Dickinson*, 396 U.S. at 129-34; *Watters*, 550 U.S. at 15 n.7. As respondents acknowledge, Riegle-Neal was not intended to alter the federal-state balance of authority as to national banks. OCC 47; CH 25. But such unintended alteration would occur if States were forbidden to enforce intrastate branching standards, which are among the laws subject to § 36(f)(1)(A) and (B).

Clearing House (at 25) attempts to contrast § 36(f)(1)(B) with another provision added by Riegle-Neal, 12 U.S.C. § 1820(h), which vests state banking officials with broad supervisory authority, including examination authority, over interstate branches of banks chartered by other States. But the contrast shows only that Congress did not afford state banking officials

6. Indeed, in other statutes using the phrase "shall be enforced," Congress has expressly provided for exclusivity when it so intended. *See* 15 U.S.C. § 1681s-2(d); *id.* § 1681m(h)(8)(B); 31 U.S.C. § 5364(e).

supervisory authority over interstate branches of national banks. The floor colloquy cited by Clearing House confirms that those two provisions of Riegle-Neal concern only the allocation of "supervisory authority" over banks' branches. 140 Cong. Rec. 24,484 (1994).

B. Section 7.4000 Is Not Entitled To *Chevron* Deference

As we have shown, 12 U.S.C. § 484 is not ambiguous on the question whether a suit by state officials against national banks to enforce valid state laws is a prohibited exercise of visitorial powers. But even if the statute were ambiguous, 12 C.F.R. § 7.4000 would not be entitled to *Chevron* deference, because it is utterly implausible that Congress delegated to OCC the authority to determine whether States may enforce their own valid laws against national banks.

1. We have explained that *Chevron* deference is inappropriate for an agency declaration of the scope of federal preemption, at least in the absence of an explicit delegation of authority to make binding preemption determinations. Pet. Br. 48-57. Both respondents claim that § 7.4000 does not declare the scope of federal preemption, but they are mistaken.[7] The unusual feature of § 7.4000 – the fact that it preempts only state enforcement power and not state substantive law – does

7. Presumably respondents strain to avoid the "preemption" label because this Court recently made clear that a specific delegation of rulemaking authority is required for an agency to possess authority to make binding preemption determinations. *Wyeth v. Levine*, 555 U.S. ____, 129 S. Ct. 1187, 1200-01 & n.9 (2009).

not remove it from the category of agency declarations of preemption. Instead, it makes § 7.4000 especially offensive to state sovereignty, and thus especially implausible as an exercise of power delegated to the OCC by Congress.

Clearing House argues (at 46-47) that § 7.4000 does not declare the scope of federal preemption because it merely interprets an express statutory provision in the NBA. But this presents a false dichotomy. An agency interpretation of an express preemption clause both interprets statutory language and declares the preemptive scope of the statute. Interpreting the meaning of an express preemption clause requires the same sensitivity to federalism interests that implied-preemption analysis demands. Indeed, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), even where Congress had specifically given the agency a role in determining the scope of an express preemption clause, this Court did not defer under *Chevron* to the agency's regulation interpreting the terms of the clause, but merely allowed its own construction to be "substantially informed" by the agency's analysis. *Id.* at 495-96.

Section 7.4000 is unlike the regulation in *Smiley v. Citibank, N.A. (S.D.)*, 517 U.S. 735 (1996), relied on by both respondents (OCC 21, CH 47), because that regulation addressed the "substantive" meaning of a statute as it governed the primary conduct of the banks, whereas this regulation addresses only the "preemptive" meaning of an express preemption provision. *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982), is similarly inapposite because the

regulation there governed the primary conduct of regulated entities.[8]

OCC suggests (at 20) that § 484, and thus the regulation interpreting it, does not address preemption of state law because § 484 does not purport to limit the application of any substantive state rule. It is no less preemptive, however, for federal law to forbid the operation of state enforcement provisions than to forbid the operation of state substantive rules. Respondents are incorrect in asserting that enforcement preemption is no more offensive to state sovereignty than other forms of preemption. CH 45; *see also* OCC Brief in Opp. 21 n.8. As this Court noted in *St. Louis*, and has reiterated on numerous occasions, "[t]o demonstrate the binding quality of a statute but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." 263 U.S. at 660.

OCC's novel assertion of enforcement preemption rests on the startling claim that, while the state fair-lending law at issue in this case is properly applied to the national banks, and while it may properly be enforced both by OCC and by private parties, including in class actions, the state attorney general is forbidden

8. As this Court explained in *Wyeth*, regulations governing primary conduct "can pre-empt conflicting state requirements." 129 S. Ct. at 1200-01. In such a case, however, the Court does not defer to an agency's views on the existence of a conflict, but "perform[s] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of preemption." *Id.*

to enforce it. Congress never made such a judgment, and it is implausible that Congress delegated to OCC the authority to make it. As this Court observed in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), when Congress authorizes an agency to prescribe the behavior of participants in a regulated industry, it does not follow that the agency is also authorized to determine the availability of judicially enforceable remedies. *Id.* at 650.

Section 7.4000 does not address an interstitial question of statutory implementation, but rather decides a fundamental question about the division of federal and state authority in enforcing valid state laws against national banks. Clearing House describes the issue as involving "the sensitive area of inter-governmental relations," and draws upon doctrines of tribal immunity and state sovereign immunity as supposed analogues to OCC's regime of enforcement preemption. CH 45-46 n.12. It is implausible that Congress intended to delegate to OCC a judgment of this character. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 258 (2006); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *see also Carcieri v. Salazar*, 555 U.S. __, 129 S. Ct. 1058, 1069 (2009) (Breyer, J., concurring) (agency interpretation not entitled to *Chevron* deference "despite linguistic ambiguity" where "circumstances indicate that Congress did not intend to delegate interpretive authority to the [agency]").

2. Indeed, the NBA as amended by Riegle-Neal in 1994 contains powerful evidence that Congress did not broadly delegate to OCC the power to make binding determinations on preemption questions. In 12 U.S.C. § 36(f)(1)(A), Congress provided that state fair-lending

laws (and certain other state laws) shall apply to interstate branches of national banks as the laws apply to branches of host state banks, with two exceptions: (1) where the state law would be preempted by federal law as to a national bank, § 36(f)(1)(A)(i); and (2) where the application of state law would have a discriminatory effect on the national bank branch as compared with a branch of a host state bank, § 36(f)(1)(A)(ii). Congress expressly authorized OCC to make binding determinations on the second exception, which requires an empirical determination of discriminatory effect, but conspicuously did not give that authority to OCC for the first exception, which requires a general determination of federal preemption. Thus, Congress clearly made conscious choices about when to authorize OCC to declare the scope of preemption. The absence of any such delegation with respect to § 484 demonstrates that Congress did not intend to give OCC authority to make binding determinations about its preemptive scope. *See also Watters*, 550 U.S. at 38-40 & nn.21-24 (Stevens, J., dissenting) (finding that OCC lacks authority to issue rules determining the scope of federal preemption).

Nor does 12 U.S.C. § 43 support OCC's claim of authority to make binding preemption determinations. *See* OCC 25; *see also* CH 52. That statute placed procedural requirements on OCC's existing practice of issuing guidance to banks or others on preemption questions through opinion letters and interpretive rulings. Section 43 does not confer any preemption authority on OCC at all, as OCC acknowledges (at 25), and the statute recognizes only a practice of giving nonbinding opinions on preemption questions, not a practice of making binding determinations eligible for

Chevron deference. *See Watters*, 550 U.S. at 39 n.22 (Stevens, J., dissenting).

As OCC has previously stated, its opinion practice "us[es] well recognized standards developed by the courts" to analyze "whether or not a federal law does, or does not, preempt a state law." *See* U.S. GAO, *Role of the Office of Thrift Supervision and Office of the Comptroller of the Currency in the Preemption of State Law* 38 (Feb. 7, 2000) (letter from Comptroller John D. Hawke, Jr., Jan. 31, 2000). Agencies are not entitled to deference in interpreting judicial precedents. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 642 n.11 (2007). Moreover, when enacting § 43, Congress made clear that it viewed OCC's past preemption analyses to be "inappropriately aggressive," and reaffirmed that such analysis should follow "well-established judicial principles." H.R. Conf. Rep. No. 103-651, at 53, *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074. Thus § 43 does not evidence any congressional intention that OCC should possess authority to make binding preemption determinations, but shows that Congress meant for preemption questions to be decided by this Court.

3. To avoid application of the presumption against preemption, OCC insists that national banks are federal "instrumentalities." *See* OCC 17 (citing *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896)). But even if that may have been true when national banks served the public function of issuing the national currency, they have not served that role since 1913. There is no basis today to consider national banks federal instrumentalities. Congress removed their immunity

from state taxation in 1969, *see* Act of Dec. 24, 1969, Public Law No. 91-156, §§ 1(a), 2(a), 83 Stat. 434 (codified at 12 U.S.C. § 548), noting that there was "no longer any justification" for it, S. Rep. No. 91-530, at 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1594, 1595. This vindicated the observation of three Justices in dissent a year before, with no objection from the majority, that a national bank was no longer a federal instrumentality, but was merely a "privately owned corporation existing for the private profits of its shareholders" that "perform[ed] no significant governmental function that is not performed equally by state-chartered banks." *First Agric. Nat'l Bank of Berkshire County v. State Tax Comm'n*, 392 U.S. 339, 354 (1968) (Marshall, J., dissenting).

Nor is a contrary presumption in favor of preemption for national banks established by *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), as respondents suggest. OCC 19-20; CH 42. In *Barnett Bank*, federal law empowered the national bank to sell insurance, while state law purported to deny the bank that power. 517 U.S. at 28-29. This Court observed that federal grants of power to national banks are "not normally limited by, but rather ordinarily pre-empt[] contrary state laws" withholding such powers. *Id.* at 32. This states the unsurprising principle that in the case of state laws that are *contrary* to federal grants of power to national banks, federal law ordinarily preempts. But that statement has no application here, where state law is not contrary to federal law and for that reason is not substantively preempted.

4. Respondents claim that the Attorney General's enforcement of New York's fair-lending laws against national banks would interfere with OCC's supervision of the federal banking system. OCC 39-42; CH 28-32. But this is not an implied preemption case, which would be governed by such analysis; respondents claim express preemption of state enforcement under § 484(a), as construed in 12 C.F.R. § 7.4000. No lower court has considered the question whether state enforcement here would interfere with federal objectives. Respondents' current arguments about interference with the federal scheme were not developed in OCC's rulemaking; indeed, neither respondent cites the rulemaking on this point.

In any event, respondents' claim of interference is unpersuasive. Respondents are in effect arguing that state enforcement would intrude upon OCC's discretion to excuse or overlook national banks' violations of New York's fair-lending laws, laws that proscribe lending discrimination just as federal law does. But because no bank is entitled to receive a pass when it violates a fair-lending law, OCC's claim (at 41) that state enforcement would interfere with its ability to implement "different enforcement priorities" from state authorities is misplaced. Congress intends that lending discrimination be eradicated, and OCC retains no prerogative to make fair-lending enforcement against national banks a low federal priority.

At bottom, respondents' arguments are just another way of saying that the substantive state law should be preempted and that federal law alone should apply to national banks. Indeed, *Easton v. Iowa*, 188 U.S. 220,

on which respondents rely (OCC 41; CII 29-30), found state substantive law preempted. The problem, for respondents, is that New York's fair-lending laws are not preempted, particularly given that the Fair Housing Act (FHA) and ECOA both contain saving clauses preserving state law. *See* 42 U.S.C. § 3615; 15 U.S.C. § 1691d(f); *see also* Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law, et al., at 4-9.

Respondents' argument that state enforcement would interfere with OCC's discretion rests on the false premise that federal law vests OCC with exclusive authority to determine liability and remedy issues in fair-housing complaints involving national banks. Even under respondents' conception, fair-housing proceedings against national banks will be initiated by diverse private and governmental actors and adjudicated in diverse administrative and judicial fora, state and federal. For example, the FHA authorizes the U.S. Department of Housing and Urban Development (HUD) to investigate discrimination complaints and conduct administrative proceedings, 42 U.S.C. §§ 3610-3612; the U.S. Department of Justice to sue in federal court for a "pattern or practice" of discrimination or upon a referral by HUD, *id.* § 3614(a)-(b); and private plaintiffs to sue in federal court, *id.* § 3613.[9] And OCC concedes that § 484 does not bar private plaintiffs from suing national banks in state court under state fair-

9. OCC has no authority to issue substantive regulations under either the FHA or ECOA. *See* 42 U.S.C. § 3614a (authorizing the Secretary of HUD to promulgate rules to implement the FHA); 15 U.S.C. § 1691b(a) (authorizing the Federal Reserve Board to promulgate regulations to effectuate ECOA).

lending laws (OCC 42 n.7), or bar certified state agencies like the New York State DHR from conducting administrative proceedings against national banks under state laws (OCC 36-37 n.5 (citing 42 U.S.C. § 3610(f))). Indeed, under 42 U.S.C. § 3610(f), HUD must afford the DHR, as a certified state agency, the first opportunity to resolve all New York fair housing complaints. *See* U.S. Dep't of Hous. & Urban Dev., Fair Housing Assistance Program (FHAP) Agencies, *available at* http://www.hud/gov/offices/fheo/partners/FHAP/agencies.cfm#NY (last visited April 19, 2009).

If it were true, as Clearing House contends (at 28-29), that conflicts between state and federal law might arise on issues such as the evidentiary value of Home Mortgage Disclosure Act (HMDA) data or whether loan-to-value ratios can explain statistical disparities in loan terms, these conflicts would not be eradicated by OCC's novel enforcement preemption. This is because private parties, including those assisted by advocacy groups and class action attorneys, would remain free to take advantage of the same potential conflicts between state and federal law. And if there were a substantial conflict, that would at most be a basis for a narrow claim of implied preemption as to that conflict, in either a private or public suit. It would not be a basis for preempting all state enforcement.

The suggestion of conflict here, however, is meritless. Contrary to Clearing House's claims (at 28-29), petitioner and the Federal Reserve do not have different views of the significance of HMDA data. Both take statistical disparities in HMDA data as the starting point for inquiry, and take the position, as they must under both federal and state law, that statistical

disparities may establish a prima facie case of discrimination.[10] And both would seek additional information to determine whether there is a legitimate nondiscriminatory explanation for the disparities. Indeed, in this case the Attorney General specifically requested additional information about pricing factors from the banks, but they refused to provide it. *See* JA 35a-36a.

In any event, whether the evidence makes out a case of discrimination under state law will ultimately be decided not by state law enforcement officers but by state courts. As we have shown (Pet. Br. 41-42), and respondents have not contested, the NBA displays no concern about the fairness of state courts in deciding allegations against national banks.

OCC argues that it is reasonable to prohibit suits by state attorneys general while permitting private suits because "[p]rivate suits do not pose a danger comparable to the purposeful state efforts to undermine the national banking system that motivated Section

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10. A Federal Reserve regulation states that ECOA includes the disparate-impact standard developed under Title VII. 12 C.F.R. § 202.6(a) n.2. Under that standard, statistical disparities may establish a prima facie case of discrimination, requiring lenders to come forward with evidence showing a legitimate nondiscriminatory basis for their decisions. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977) (intentional discrimination). Clearing House claims (at 28-29) that the Federal Reserve will not find a prima facie case based on HMDA data alone, but they point only to a statement that such data "will not alone prove unlawful discrimination," which is not the same thing.

484's enactment." OCC 42 n.7.[11] But there is no evidence that Congress was concerned about States undermining national banks by bringing lawsuits to enforce generally applicable and nondiscriminatory state laws, especially fair-lending laws that further a joint federal and state interest in eliminating discrimination in lending.

Clearing House's argument (at 30-32) that OCC is better positioned than state attorneys general to enforce fair-lending laws because of its close supervisory relationship with national banks would be better made to Congress than to this Court, because Congress has simply not afforded the Comptroller exclusive authority to enforce fair-lending laws with respect to national banks.[12]

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11. OCC also asserts (at 42 n.7) that private suits ensure compensation for victims of discrimination, but suits by state attorneys general serve the very same interest. *See, e.g.*, N.Y. Executive Law § 63(12) (authorizing the Attorney General to obtain "restitution and damages").

12. Even as to OCC's core mission of overseeing banks' safety and soundness, its informal and confidential supervisory approach has increasingly come under fire. *See, e.g.*, Office of the Inspector Gen., U.S. Dep't of Treasury, *Safety and Soundness: Material Loss Review of ANB Financial, National Association*, at 13 (2008), *available at* http://www.treas.gov/inspector-general/audit-reports/2009/oig09013.pdf (last visited April 12, 2009); *Consumer Protections in Financial Services: Past Problems, Future Solutions: Hearing Before the S. Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 18-19 (2009) (statement of Patricia J. McCoy, George J. & Helen M. England Professor of Law, University of Connecticut School of Law), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=11be680d-04db-42cc-89bf-7fe4ffe4d9cd (follow links) (last visited April 19, 2009).

Moreover, enforcement by state attorneys general carries its own considerable benefits toward the goal of ending lending discrimination. Because attorneys general are more familiar with local conditions than OCC, they often learn of the practices that are harming residents and communities before federal regulators do. And the accountability of elected attorneys general to local residents creates strong incentives to enforce fair-lending laws vigorously. By contrast, OCC's close relationship with banks and dependence on bank assessments for funding may dampen its fair-lending enforcement. The possibility of state enforcement action may provide a useful check against such complacency by OCC, and in particular cases, enforcement by state or local officials may actually spur OCC to action. See Brief of *Amici Curiae* Center for Responsible Lending, et al., at 24 (discussing the Providian National Bank case).

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 2009

AMICUS CURIAE BRIEF

No. 08-453

In The
Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF ALL FORMER COMPTROLLERS OF THE CURRENCY SINCE 1973 AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF ALL FORMER COMPTROLLERS OF THE CURRENCY SINCE 1973 AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

James E. Smith, John G. Heimann, C. Todd Conover, Robert L. Clarke, Eugene A. Ludwig, and John D. Hawke, Jr. respectfully submit this brief as *amici curiae* in support of respondent.

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae James E. Smith, John G. Heimann, C. Todd Conover, Robert L. Clarke, Eugene A. Ludwig, and John D. Hawke, Jr. (the "*Amici*") each served as Comptroller of the Currency. Appointed by Presidents of both political parties, *Amici* collectively oversaw and directed the Office of the Comptroller of the Currency ("OCC") for more than 30 years, starting in July 1973 and ending in October 2004.

Each of the *Amici* thus has strong views about the outcome of this case, which involves the authority of the OCC to exercise plenary visitorial powers over national banks' banking activities – authority that

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[1] The parties have consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

Petitioner seeks to take upon himself with respect to national banks operating in the State of New York.

Respondents demonstrate why Petitioner cannot prevail under the text and structure of the National Banking Act and the history of the national banking system. *Amici* supplement that argument by showing that the OCC's exclusive supervisory and enforcement authority over national banks gives the OCC a unique ability to protect consumers in their dealings with national banks while also fulfilling Congress' objective that the national banking system be one "extending throughout the country, and independent, so far as powers conferred are concerned, of state [action that] * * * might impose limitations and restrictions as various and as numerous as the states." *Easton v. Iowa*, 188 U.S. 220, 229 (1903).

SUMMARY OF ARGUMENT

I.

One of the OCC's primary objectives is to ensure fair and equal access to financial services for all Americans. Through the exercise of its comprehensive visitorial powers, the OCC is uniquely equipped to achieve this objective effectively and efficiently.

There is a common misapprehension that the OCC's mission to ensure the safety and soundness of national banks is separate from – and paramount over – the OCC's mission to ensure national banks'

compliance with laws governing consumer protection. But the OCC considers its responsibility to ensure national bank compliance with consumer protection laws, including fair lending laws, an integral part of its obligation to ensure national banks' safety and soundness. The OCC uses the wide range of its supervisory powers in an ongoing effort to alert national banks of potential non-compliance that poses risks to consumers and to ensure that they are addressed as early as possible.

Because of its continuous supervision of national banks, the OCC is uniquely able to identify and mitigate such risks to the banks and those they serve. Experienced OCC examiners undertake examinations of all national banks every 12 to 18 months, and are constantly on-site at the largest national banks. Based on its examinations, the OCC assigns ratings to each national bank. These ratings have important consequences for national banks, including effecting their authority to conduct particular banking activities, and thus provide the OCC with great leverage in seeking changes in a national bank's policies or practices as part of the examination process.

The OCC requires national banks to have in place a system for rapidly and effectively responding to complaints from customers. The OCC also maintains its own system for receiving and responding to customer complaints. OCC examiners take into account customer complaint information when assigning national bank ratings.

The OCC has a wide range of both informal and formal enforcement tools at its disposal, including the power to require corrective national bank board resolutions or memoranda of understanding; issue notices of charges; impose cease-and-desist orders; hold hearings; assess, collect, and disburse monetary penalties; or order prejudgment attachments. *See* 12 U.S.C. § 1818(b)-(c), (h)-(i). Further, the OCC may require a national bank to "make restitution or provide reimbursement, indemnification, or guarantee against loss." *Id.* § 1818(b)(6)(A).

The threat of OCC enforcement actions, like the examination ratings assigned by the OCC, is a significant incentive for national banks to address any compliance issues *before* they become serious problems. The OCC's supervision of national banks is therefore prophylactic in nature, and is largely exercised without the need for enforcement proceedings. However, whenever such leverage is insufficient to achieve full compliance, OCC does not hesitate to take aggressive enforcement action against national banks.

II.

As this Court has recognized, essential to the national banking system is the *uniform* and *consistent* regulation of national banks throughout their individual nationwide operations. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11-14 (2007). Congress assigned the OCC the responsibility to

effectuate such regulation over national banks, and to ensure their compliance with all applicable law on a consistent basis *nationwide*.

Individual and potentially contradictory state enforcement proceedings against national banks would interfere with the nationwide protection of consumers that the OCC is uniquely able to provide. Such proceedings would subject national banks to potentially conflicting disciplinary directives, including injunctive orders, and divert state resources from problems outside the scope of federal regulation. States already have an enormous responsibility to enforce state law against state-regulated entities, such as those involved in predatory lending abuses – which the States themselves have recognized are largely confined to non-depository institutions in the subprime mortgage market. The rights and interests of consumers would be undermined if States could use their limited resources to impose additional layers of enforcement authority on national banks rather than concentrating those resources on state-regulated entities.

III.

Despite the absence of state authority to enforce laws with respect to national banks' banking activities, the States have a valuable role to play in identifying possible problems customers may encounter in dealing with national banks.

Recognizing this, the OCC has developed a variety of means to partner with the States. Through such partnerships, the OCC and the States share various types of information, which enhances the OCC's overall supervision of national banks. Thus, the States can and do meaningfully contribute to the OCC's fulfillment of its mission to ensure protection for consumers.

ARGUMENT

The National Bank Act, of which the grant of visitorial authority to the OCC, 12 U.S.C. § 484, is a core part, requires that the OCC comprehensively supervise all aspects of a national bank's operations, from the moment a national bank receives its charter and thereafter throughout its existence. Exclusivity of supervisory authority is critical to the effectiveness of the OCC's supervisory regime.

I. THE OCC'S EXCLUSIVE SUPERVISORY AUTHORITY OVER NATIONAL BANKS PROVIDES UNIQUE PROTECTION FOR THE NATIONAL BANKING SYSTEM AND THE RIGHTS AND INTERESTS OF CONSUMERS

One of the OCC's primary objectives is to ensure fair and equal access to financial services for all consumers. *About the OCC*, http://www.occ.treas.gov/aboutocc.htm. This objective is an integral part of the OCC's mission to ensure the safety and soundness of

the national banking system: "compliance [with consumer protection laws] is inseparable from safety and soundness." OCC, *Annual Report: Fiscal Year 2008*, at 27 (2009), *available at* http://www.occ.treas.gov/annrpt/1-2008AnnualReport.pdf [hereinafter "OCC 2008 Annual Report"].

As one of the *Amici* has testified, "direct supervision is a regulator's primary method for ensuring bank safety and soundness, which is crucial to maintaining stability in our nation's financial markets." *Current and Future Bank Examination and Supervision Systems: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 105th Cong. (1997) (prepared statement of Eugene A. Ludwig, Comptroller of the Currency), *available at* http://financialservices.house.gov/banking/10897occ.htm. The OCC alone is organized to ensure comprehensive and effective direct supervision of national banks, their operating subsidiaries, and their third-party service providers.

Such direct supervision provides the OCC with its unique capacity to ensure national bank compliance with applicable laws and regulations, including fair lending laws. *See* OCC 2008 Annual Report at 26-27. The comprehensive nature of the OCC's direct supervision ensures that consumers are offered maximum protection against unfair treatment in their access to and enjoyment of the products and services of national banks, thereby protecting consumers, for example, from the discriminatory

treatment addressed by the state law in the instant case.

The OCC's supervisory process has several key components, including educating national banks on their legal compliance and other responsibilities; regularly examining national banks and their operating subsidiaries and service providers; rating national banks based on examination findings; and acting, through both formal and informal enforcement mechanisms, to compel compliance by national banks with all applicable laws and regulations.

It is important to recognize that adherence to OCC supervisory directives is not "voluntary." Supervisors expect to be listened to and if behaviors requested by the supervisor are not promptly adhered to, adverse consequences follow. Because the OCC can employ a wide variety of supervisory and enforcement tools without resort to the courts, the threat of an OCC enforcement action is itself a formidable disciplinary mechanism. As the current Comptroller testified:

> [O]ur compliance regime is not enforcement-only. Instead, it is better described as supervision first, enforcement if necessary. With supervision addressing so many problems early that enforcement often is not necessary. For this reason, the number of formal enforcement actions taken by any bank supervisory agency is a misleading measure

> of the effectiveness of its consumer compliance regulation.

Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services, 110th Cong. 14 (2007) (statement of John C. Dugan, Comptroller of the Currency) [hereinafter "Dugan 2007 Testimony"].

A. The OCC Proactively Educates National Banks on Their Compliance Obligations

The OCC provides all national banks with extensive guidance regarding laws and regulations relevant to them. This guidance includes, among other things, legal staff interpretations, advisory letters, significant decisions on national bank applications, and a list of publicly released formal enforcement actions. The OCC also periodically issues bulletins to inform national banks and examiners about the OCC's or OCC-supported policies, guidelines, and pending regulatory changes. These materials are all publicly accessible through the OCC's website, as are recent court decisions relevant to national banks and OCC briefs.

With respect to consumer protection in particular, the OCC publishes the "Comptroller's Handbook for Consumer Compliance," a collection of manuals containing the OCC's current guidance and procedures for ensuring a national bank's

compliance with applicable consumer protection statutes and regulations.[2] And as specific, supplemental guidance on the practices needed to ensure compliance with fair lending laws, the OCC in April 2006 published a 147-page guide to "Fair Lending Examination Procedures."

The OCC also holds conferences and seminars focusing on consumer protection. For example, in 2008, the OCC hosted a two-day conference dedicated to fair lending. *See OCC Fair Lending Conference*, http://www.occ.treas.gov/flc_hp.htm. Together with the OCC's written guidance materials, such public forums serve to expand national banks' awareness and understanding of their legal obligations, and allow the OCC to obtain feedback from consumer advocacy groups and others that can inform the OCC's supervision of national banks. Through this

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[2] *E.g.*, Federal Trade Commission Act, 15 U.S.C. §§ 41-58; the Truth in Lending Act, 15 U.S.C. §§ 1601-67f; the Home Ownership and Equity Protection Act, 15 U.S.C. § 1639; the Fair Housing Act, 42 U.S.C. §§ 3601-19; the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-91f; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-17; the Community Reinvestment Act, 12 U.S.C. §§ 2901-08; the Truth in Savings Act, 12 U.S.C. §§ 4301-13; the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-93r; the Expedited Funds Availability Act, 12 U.S.C. §§ 4001-10; the Flood Disaster Protection Act, 42 U.S.C. §§ 4001-128; the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-10; the Fair Housing Home Loan Data System, 12 C.F.R. § 27; the Credit Practices Rule, 16 C.F.R. § 444; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-81(u); the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-92p; and applicable data privacy and security laws.

educational process, the OCC proactively engages national banks in early detection and correction of any practices or policies that could constitute or lead to violations of consumer protection laws or regulations, including those concerning fair lending.

B. The OCC Gathers Data Directly From National Banks And Consumers To Ensure That National Banks Are Adhering To Their Consumer Protection Obligations

1. The OCC Examines National Banks on an Ongoing Basis, Including By Maintaining Full-Time Resident Examiners at the Larger National Banks

A central component of the OCC's supervisory regime is the examination process. This process is pervasive and invasive. An entity may not obtain a national bank charter (including after holding a state charter) unless it can satisfy the stringent standards underlying such examinations, and it must live up to those standards throughout its existence as a national bank.

Moreover, the operating subsidiaries of national banks are also subject to the same extensive and comprehensive examination process as national banks themselves. *See* 12 U.S.C. § 24a(g)(3)(A); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 16-19 (2007). The same is true for service providers of national banks, which, with respect to the services

they perform on behalf of national banks, are "subject to regulation and examination by [the OCC] to the same extent as if such services were being performed by the depository institution itself on its own premises." 12 U.S.C. § 1867(c)(1). National banks may not, therefore, avoid strict OCC oversight by using operating subsidiaries or service providers as a means through which to conduct their permissible activities. All national bank activities, without regard to whether they are performed directly by a national bank, are subject to the OCC's comprehensive examination and enforcement authority.

The OCC's examination process includes monitoring national banks' activities, assessing risks, completing core assessments of national banks, and communicating with bank management and directors throughout the supervisory cycle, which ranges from 12 to 18 months, depending on a bank's condition and circumstances. *See* OCC, *Annual Report: Fiscal Year 2007*, at 37-38 (2008), *available at* http://www.occ.treas.gov/annrpt/2007AnnualReport.pdf [hereinafter "OCC 2007 Annual Report"].

The OCC employs more than 2,000 bank examiners to monitor banking activities for approximately 1,678 national banks in the United States. OCC 2008 Annual Report at *ii*. Approximately 1,400 examiners work full-time on community bank supervision. *Id.* at 12. Their work is coordinated through a national network of almost 50 field offices and 24 satellite offices that are located in virtually every State in the country, overseen by four district

offices in New York, Dallas, Chicago, and Denver. *Id.* For large and mid-size national banks, the OCC assigns teams of resident examiners. *Id.* And, at 17 of the largest national banks, the OCC maintains teams of resident examiners *permanently on site*, engaged in *daily supervision of all aspects of their operations*. *See id.* at 13. More than 460 examiners are deployed at these large banks full-time. *Id.*

Integral to the examination process is the OCC's scrutiny of national bank policies and procedures for compliance with consumer protection laws and regulations. "The OCC was the first federal banking agency to conduct regular, separate, full-scope consumer examinations, using specially-trained consumer examination specialists, and to produce consumer examination manuals and policy guidelines for bankers. That was in 1976." Julie L. Williams, Chief Counsel and First Senior Deputy Comptroller of the Currency, OCC, Remarks before the Consumer Federation of America 15th Annual Consumer Financial Services Conference 3 (Dec. 5, 2003), *available at* http://www.occ.treas.gov/ftp/release/2003-97a.pdf [hereinafter "Williams 2003 Remarks to CFA"].

The OCC has a cadre of more than 100 highly trained national bank examiners who dedicate their time specifically to consumer compliance examinations, consulting, and review. Working with dozens of attorneys and consumer complaint specialists, these examiners have plenary authority to investigate national bank activities and to

determine their compliance with consumer protection laws.

During each supervisory cycle, the OCC performs a fair lending risk assessment in each national bank to determine the bank's compliance with applicable fair lending laws and regulations and to assess the level of fair lending risk at the bank, including its mortgage subsidiaries. OCC 2007 Annual Report at 50. The fair lending risk assessment starts with the examiners' general knowledge about a bank based upon their past experience and records. Examiners seek to understand the bank's credit processes, look at the bank's history, and evaluate the bank's fair lending controls.

Based on its examinations of each national bank, the OCC assigns the bank three critical ratings. First, the national bank receives a composite rating under the Uniform Financial Institutions Rating System, or "CAMELS," integrating ratings of Capital adequacy, Asset quality, Management, Earnings, Liquidity, and Sensitivity to market risk. *Comptroller's Handbook: Bank Supervision Process*, at 11 (2007), *available at* http://www.occ.gov/handbook/banksup.pdf [hereinafter "Bank Supervision Process"]. CAMELS ratings range from the highest rating of 1, representing the least supervisory concern, to the lowest rating of 5, representing the greatest supervisory concern. *Id.* at 11-12. CAMELS ratings are formally communicated to a bank's board of

directors and management through a report of examination or other written communication.

Second, the OCC assigns each national bank a separate rating under the Uniform Interagency Consumer Compliance Rating System, used to measure the nature and extent of an institution's compliance with consumer protection laws. *Id.* at 89. These ratings are based on an evaluation of a bank's present compliance and the adequacy of its operating systems designed to ensure continuing compliance. Like CAMELS ratings, these compliance ratings are given on a scale of 1 through 5 in increasing order of supervisory concern. A national bank's Consumer Compliance rating is considered in determining the bank's CAMELS composite rating, and an adverse Consumer Compliance rating can result in a substantial downgrade in the CAMELS rating.

Third, the OCC reviews and rates each national bank's "record of meeting the credit needs of its entire community * * * consistent with the safe and sound operation of such institution," as required by the Community Reinvestment Act ("CRA"). 12 U.S.C. § 2903(a)(1); *see* 12 C.F.R. § 25.11(b). The OCC assigns a CRA rating to each national bank, and the rating is "adversely affected" by evidence of violation of fair lending laws, which may be uncovered during the OCC's compliance examination of the bank. 12 C.F.R. § 25.28(c)(1).

2. The OCC Uses Data Gathered Under the Home Mortgage Disclosure Act To Help Identify Possible Violations of Fair Lending Laws

As an integral part of the OCC's examination process, OCC economists and statistical experts are involved in reviews of statistical data, including data collected pursuant to the Home Mortgage Disclosure Act ("HMDA"), 12 U.S.C. §§ 2801-10. HMDA requires lending institutions to provide information that helps to show whether they are serving the housing credit needs of their neighborhoods and communities. Lenders must report loan data such as the types and amounts of loans made (or applied for); the disposition of loan applications, such as whether they were denied or resulted in an origination of a loan; loan prices; the property to which each loan relates (*e.g.*, single-family vs. multi-family) and its location (including the census tract); and the borrower's or applicant's ethnicity, race, sex, and income.

The OCC carefully reviews, scrutinizes, and analyzes HMDA data as part of its fair lending risk assessment process. As Comptroller Dugan has explained, however, while "HMDA data are a valuable starting point" for the OCC's rigorous analysis of discrimination and fair lending, "HMDA data alone are not enough, and can even be misleading unless interpreted carefully." John C. Dugan, Comptroller of the Currency, Remarks before the 2008 OCC Fair Lending Conference 4 (Sept. 10, 2008), *available at* http://www.occ.treas.gov/ftp/release/2008-103a.pdf. For

example, although HMDA data include some potentially relevant determinants of price, such as lien status, they exclude many other potential determinants, such as borrower credit history, borrower debt-to-income ratio, and the ratio of the loan amount to the value of the property securing the loan. Because "fairness and potential discrimination can't be assessed by comparing simple denial rates or average rate spreads across groups," a "valid assessment requires the hard work of applying more sophisticated methods from probability and statistics, so that relevant factors are considered in a rigorous and systematic way." *Id.* Thus, the OCC expands its fair lending reviews beyond HMDA data, probing a variety of pertinent data sources, including national banks' loan files.

The OCC's fair lending specialists scrutinize this additional information, such as loan-to-value ratios, credit scores, and debt service ratios, to do a more targeted, sophisticated, and comprehensive analysis of a lender's underwriting and pricing decisions than could be done based on HMDA data alone.

3. The OCC Collects and Acts on Consumer Complaints Against National Banks

The OCC requires national banks to have in place procedures to monitor and address consumer complaints. John C. Dugan, Comptroller of the Currency, Remarks before the Exchequer Club and

Women in Housing and Finance (Jan. 17, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-4a.pdf. But the OCC also obtains information directly from consumers regarding the activities of national banks. It uses this information both to resolve specific consumer complaints, including fair lending complaints, and proactively to identify and root out problems before they spread within the national banking system.

For more than three decades, during which time the *Amici* successively directed the OCC, the OCC has maintained a system that tracks consumer complaints. Developed in 1976, that system has evolved into the Customer Assistance Group ("CAG"), which is dedicated to the receipt and fair resolution of complaints from consumers regarding national bank practices. *See* Bank Supervision Process at 50; OCC, *Consumer Complaints and Assistance*, http://www.occ.treas.gov/customer.htm. The CAG, overseen since 1997 by the OCC's Office of the Ombudsman, plays an integral role in assisting OCC bank supervision in assessing compliance and reputation risks within the national banking system. *See* Bank Supervision Process at 50-51.

In 2008, the CAG received more than 90,000 telephone calls from customers of national banks and processed more than 41,000 written complaints. OCC 2008 Annual Report at 39. When a complaint is received by the CAG, it is assigned to a customer assistant specialist for evaluation within an average of five business days. Once assigned to a specialist,

the initial review must be completed within one business day. In many cases, the CAG staff can resolve consumer complaints over the phone. When a complaint cannot be resolved immediately, it is referred to OCC supervisory officials for investigation and appropriate action. Complaints are also sent directly to the national banks to which they pertain.

The CAG also uses the complaint data it collects for more general, forward-looking purposes. The CAG analyzes complaint data and disseminates them to OCC examiners, policymakers, and attorneys to be integrated into the bank supervisory process. *See* OCC 2007 Annual Report at 55-56. "Data derived from the CAG process plays an important role in identifying problems – at a particular bank or in a particular segment of the industry – that may warrant further investigation by examination teams, supervisory guidance to address emerging problems, or enforcement action." OCC, *2005-2006 Report of the Ombudsman* 26 (2007), *available at* http://www.occ.treas.gov/Ombudsman/2006OmbudsmanReport.pdf. OCC examiners are required to consider consumer complaint information when undertaking examinations and assessing a national bank's overall compliance risk and ratings.

The CAG also identifies complaint trends for particular products, such as home mortgages and credit cards. *Id.* Senior OCC officials review these trends when forging the OCC's supervisory strategies and developing new guidance on consumer compliance issues. *Id.* The CAG's management team also hosts

formal and informal meetings with banking associations, consumer advocacy groups, and state regulatory authorities to promote strong working relationships, to share best practices, and to strengthen risk identification measures. *Id.* at 27.

C. The OCC Has a Range of Supervisory Tools With Which To Ensure That National Banks Comply With All Applicable Consumer Protection Laws and Regulations

As noted, the OCC's supervision of national banks is designed to be prophylactic, but when prophylactic measures are not sufficient, the OCC takes enforcement action. National banks have tremendous incentives to accede to OCC's recommendations *before* such action is taken. Indeed, "[a]chieving voluntary compliance with laws, recommendations and agreements is often the rule rather than the exception. The [OCC's] potent alternative of formal enforcement proceedings usually insures such voluntary compliance: 'Recommendations by the agenc[y] concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings.'" *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 218 (E.D.N.Y. 1979) (Weinstein, J.) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 330 (1962)).

Due to the OCC's leverage over national banks, "when a bank examiner comes into a [national] bank

and says, 'I want you to fix something,' * * * by and large, they get very quick responses." *Oversight of the Office of the Comptroller of the Currency: Examination of Policies, Procedures and Resources: Hearing Before the H. Comm. on Financial Services*, 108th Cong. 46, 69 (2004) (testimony of John D. Hawke, Jr., Comptroller of the Currency) [hereinafter "2004 Oversight Hearing"]. As soon as any "problem or weaknesses are identified and communicated to the bank, the bank's senior management and board of directors are expected to promptly correct them." OCC, *Policies & Procedures Manual: Enforcement Action Policy*, PPM 5310-3 (rev) 3 (2001), *available at* http://www.occ.treas.gov/ftp/ppm/ppm-5310-3.pdf [hereinafter "Enforcement Action Policy"].

By exercising its confidential, powerful, supervisory leverage over national banks, the OCC can "fix problems before they become systemic," and "can get nationwide remedies if [it] find[s] systemic problems." 2004 Oversight Hearing at 73. Both the consequences of adverse examination ratings and the potent enforcement options available to the OCC demonstrate why national banks are so quick to respond to OCC corrective instructions without the OCC's resort to enforcement proceedings.

1. OCC Examination Ratings Have Highly Significant Consequences for National Banks

There are highly significant consequences of being subject to an adverse OCC determination resulting from a supervisory examination, including restrictions on the bank's activities. For example, a national bank that receives a CAMELS composite rating of 3 will face several restrictions. First, the bank will no longer be deemed an "eligible bank," 12 C.F.R. § 5.3(g), and thus will lose the benefit of expedited review by the OCC for filings, 12 C.F.R. § 5.13(a)(2), will require prior approval from the OCC before issuing or prepaying subordinated debt, 12 C.F.R. § 5.47(b), and will be unable to apply to the OCC to make certain loans, 12 C.F.R. §§ 32.7(a)-(b).

Second, a national bank that receives a composite rating of 3 will no longer be deemed a "well-managed" bank, 12 C.F.R. § 5.34(d)(3)(i), and thus will have to obtain prior approval before acquiring, establishing, or performing new activities in an operating subsidiary, 12 C.F.R. §§ 5.34(e)(5)(ii)(A), (e)(5)(iv), (e)(5)(vi); will be prohibited from controlling or holding an interest in a financial subsidiary, 12 C.F.R. § 5.39(g); and its parent bank holding company will not be able to engage in expanded "financial activities," such as insurance underwriting, securities underwriting, and merchant banking, as otherwise permitted under section 4(k) of the Bank Holding Company Act, 12 U.S.C. §§ 1843(k)(4), (l)(1). Third, the bank will face additional consequences, such as

a required surcharge on its semiannual assessment, 12 C.F.R. § 8.2(d), and may face more frequent on-site examinations, 12 C.F.R. § 4.6(b).

A national bank receiving a CAMELS rating of 4 or 5 will be subject to all of the aforementioned restrictions as well as additional adverse consequences, such as restrictions on its ability to appoint a new director or senior executive officer. 12 C.F.R. §§ 5.51(c)(6), (d)(1). Other rankings also trigger adverse consequences. For example, if a national bank receives less than a "satisfactory" CRA rating, the OCC can deny the bank's application to establish a branch office or to engage in a merger transaction. 12 C.F.R. § 25.29(a).

2. The OCC Has a Wide Range of Informal and Formal Enforcement Tools To Use Against National Banks

Under 12 U.S.C. § 1818, the OCC has power to ensure national banks' compliance with all applicable laws, rules, and regulations. The OCC has a wide variety of enforcement tools, both informal and formal, with which to achieve this goal.

The OCC's informal enforcement actions include, for example, requiring national bank board resolutions, memoranda of understanding, commitment letters, and other written documentation of a national bank's commitment to corrective measures to address safety and soundness and compliance concerns. Enforcement Action Policy at 4. Such actions often address issues

relating to compliance with consumer protection laws, such as disclosure of loan terms and avoidance of inappropriate lending practices. Informal enforcement actions provide a bank with "more explicit guidance and direction," and, by requiring a written commitment from the bank's board of directors, can serve as "evidence of the board's commitment to correct identified problems before they adversely affect the bank's performance or cause further decline in the bank's condition." *Id.*

Pursuant to federal statute, the OCC's informal enforcement actions are not made public. *See* 5 U.S.C. § 552(b)(8). Congress found it essential "to insur[e] the security of our financial institutions by making available *only* to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by[,] on behalf of, or for the use of such agencies." S. Rep. No. 813, 89th Cong. 45 (1965) (emphasis added). "If details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less than fully with federal authorities." *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978) (citing *Hearing on S. 1663 Before the Subcomm. on Administrative Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. 186 (1964)).

Thus, the fact that the OCC's informal enforcement actions are extraordinarily effective is generally unappreciated by commentators outside

the banking industry, and the efficacy of informal OCC actions is vastly underestimated. Indeed, for every formal enforcement action it has taken, the OCC has achieved dozens of corrective actions by national banks through informal enforcement actions. As the OCC's experience has demonstrated, "fixating on the use of 'formal' enforcement actions exalts form over substance" and, because it "verges on elevating publicity over effectiveness," it is counterproductive. Julie L. Williams, Acting Comptroller of the Currency, Remarks before the New York Bankers Association 4 (July 14, 2005), *available at* http://www.occ.treas.gov/ftp/release/2005-68a.pdf.

The OCC will, however, as necessary, use its formal enforcement tools, and the threat of such use is a major deterrent to aberrant behavior by national banks. The OCC may, for example, issue notices of charges; impose cease-and-desist orders; hold hearings; and assess, collect, and disburse penalties; or order prejudgment attachments. *See* 12 U.S.C. §§ 1818(b)-(c), (h)-(i). Cease and desist orders have been used to discipline all aspects of a national bank's operations. *See, e.g.*, *Groos Nat'l Bank v. OCC*, 573 F.2d 889 (5th Cir. 1978); *First Nat'l Bank of Eden v. OCC*, 568 F.2d 610 (8th Cir. 1978). Further, the OCC may require a national bank to "make restitution

or provide reimbursement, indemnification, or guarantee against loss." 12 U.S.C. § 1818(b)(6)(A).[3]

3. The OCC Has a Strong Record of Formal Enforcement Actions Directed Towards Consumer Protection

Many of the OCC's formal enforcement actions have been directed specifically towards consumer protection, including several that have involved significant restitution. In 2008, for example, the OCC ordered one of the largest national banks to make restitution to consumers harmed by the bank's relationship with telemarketers and third party processors.[4] In addition to estimated restitution possibly exceeding $125 million, the bank was required to contribute approximately $8.9 million to consumer education programs directed at the elderly and to pay a $10 million civil money penalty. And in a landmark 2000 case, the OCC required another national bank to cease unfair practices (including

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[3] In addition to these potential sanctions, a bank subject to a formal enforcement action by the OCC is deemed to be in "troubled condition," 12 C.F.R. § 5.51(c)(6), and will no longer qualify as an "eligible bank," 12 C.F.R. § 5.3(g) (and thus will lose significant privileges, as discussed *supra* with respect to CAMELS ratings).

[4] Amended Agreement, #2008-159 (Dec. 8, 2008), *available at* http://www.occ.treas.gov/FTP/EAs/ea2008-159.pdf. Because of the OCC's constant supervisory role, the OCC was able to monitor and revise the original mediated settlement with the bank, directing the bank to reimburse consumers directly.

failure to adequately disclose to consumers the significant limitations in a credit protection program it marketed) and pay consumers over $300 million in restitution.[5]

This landmark case was followed in the next year by five additional enforcement actions redressing unfair and deceptive practices at other national banks. While none of these latter actions imposed nearly as high financial sanctions, they ensured that the national banking system maintained best practices across-the-board.

In the fair lending context, the OCC has, in cooperation with the Attorney General of the United States and the Department of Housing and Urban Development ("HUD"), undertaken thousands of fair lending examinations and enforcement actions against national banks, some of which have included formal enforcement actions.[6] In 2005, for example, the OCC took formal enforcement action against a national bank and its subsidiary for unfair lending practices, requiring the bank to set aside at least $14 million to fund reimbursement payments to borrowers and strengthen its policies and control systems to ensure compliance with all applicable

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[5] Consent Order, #2000-53 (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000-49b.pdf.

[6] *See, e.g.*, Eugene A. Ludwig, Comptroller of the Currency, On Continued Efforts To Promote Fair Lending and Community Reinvestment and Identifying and Eradicating Lending Discrimination (Aug. 5, 1997), *available at* 1997 WL 847864.

consumer protection laws, regulations and OCC guidance.[7]

In another case, the OCC undertook a fair lending examination that led to a settlement that included: (1) permanently enjoining a national bank from discriminating on the basis of race or national origin against any person in making available, or in the terms and conditions of, a mortgage loan; (2) requiring the bank to deposit $400,000 into a fund to compensate the aggrieved persons the Comptroller had identified; and (3) imposing a civil money penalty of $25,000.[8]

Even when they are imposed, monetary penalties and other sanctions do not signal the end of OCC compliance enforcement. When the OCC undertakes an enforcement action, it continues on-site assessment of the bank's compliance. A rating of satisfactory compliance can be achieved on a particular article of an enforcement action only after the bank has adopted, implemented, and adhered to all of the corrective actions set forth in the article, the

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[7] Agreement, #2005-142 (Nov. 2, 2005), *available at* http://www.occ.treas.gov/ftp/eas/ea2005-142.pdf.

[8] Consent Order, No. 99-13, 1999 WL 166598, at *1-*3 (Feb. 12, 1999); *see also* Settlement Agreement, Case No. 1:95 CV 2211 (N.D. Ohio 1995) (requiring national bank operating subsidiary to take remedial action as well as make compensatory payments to affected individuals based on possible violations of the Fair Housing Act and the Equal Credit Opportunity Act), *available at* http://www.usdoj.gov/crt/housing/documents/huntingtonsettle.php.

corrective actions have proven effective in addressing the bank's problems, and OCC examiners have verified through the examination process that this has been accomplished.

Data on outstanding enforcement actions, including information on enforcement action trends and broader problem-bank trend information, is included in the OCC's Problem Bank Report, which is distributed to OCC senior staff. Enforcement Action Policy at 16. This Report alerts the OCC staff to areas that examiners should probe at every national bank to root out possible systemic risk trends before they develop. The OCC also makes its enforcement information web-accessible to the public. In this way, OCC enforcement actions serve not solely to address a particular bank's past problems, but can be used by the OCC to anticipate and prevent future problems in other banks.

II. State Enforcement Actions Regarding National Banks' Banking Activities Would Adversely Interfere With The OCC's Supervisory Process

Essential to an effective national banking system is the *uniform* and *consistent* supervision of national banks throughout their individual nationwide operations. Subjecting national banks' banking activities "to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business," contrary to the

National Bank Act. *Watters*, 550 U.S. at 13. It was specifically to prevent such interference that Congress vested the Comptroller, to the exclusion of the States, with visitorial authority over national banks. "Diverse and duplicative superintendence of national banks' engagement in the business of banking * * * is precisely what the [National Bank Act] was designed to prevent." *Id.* at 13-14 (citing *Easton*, 188 U.S. at 229).

The OCC's uniform, nationwide supervisory process has great advantages over state enforcement. By applying uniform standards, cognizant of the full range of issues pertinent to the operations of national banks, the OCC is uniquely able to determine what form of corrective action will best serve the national banking system and consumers throughout the United States. Moreover, because the OCC has unique authority to enforce efficiently *all* applicable laws against national banks on a *nationwide* basis, it can, in a single enforcement proceeding (formal or informal), obtain relief for consumers *throughout the United States*.

State attempts to enforce their disparate laws on national banks – attempts often motivated by varying policies and interests that are as diverse as the 50 States – would frustrate this uniform supervision regime. National banks would find themselves facing "a multiplicity of state and local restrictions and directives that would instruct them – in different ways – on how to conduct their business," and, thus, "face uncertainty about the standards applicable to

their business and their potential liability for a misstep." Letter from John D. Hawke, Jr., Comptroller of the Currency, to Paul S. Sarbanes, U.S. Senator (Dec. 9, 2003), *available at* http://www.occ.treas.gov/foia/SarbanesPreemptionletter.pdf.

For example, if States were able to take enforcement action against national banks, national banks would potentially be subject to injunctive orders obtained by state attorneys general that would require actions inconsistent with specific directives of the OCC. Such orders obtained in one State also could conflict with orders obtained in one or more other States. The particular enforcement approaches of each State, as well as each locality of every State, could be at odds with and seriously undermine the OCC's exercise of its discretion, from its unique vantage point as the regulator and supervisor of all national banks, to ensure nationwide, uniform consumer protection with respect to national bank activities.

Moreover, state enforcement efforts against national banks would undermine consumer protection efforts by diverting state resources from other problem sources, such as state-licensed subprime lenders and mortgage brokers. As Comptroller Dugan has explained to Congress:

> To those who argue that there should be both Federal and State supervision of national banks, that there can never be too many cops on the beat, I must respectfully disagree. We believe it is

> counterproductive for States to focus their finite enforcement resources on national banks that are already heavily regulated, especially when there are lightly regulated State entities, like many subprime lenders and mortgage brokers, that clearly have been the source of real problems. You can indeed have too many cops on the same beat if it means leaving other, more dangerous parts of the neighborhood unprotected.

Dugan 2007 Testimony at 15.

The States themselves have recognized that predatory lending abuses are largely confined to the subprime mortgage market and to non-depository institutions, which are not federally regulated. As explained by many of the state attorneys general, the key problems in this area involve "'state housing creditors – namely, non-bank finance companies – and not supervised depository institutions.'" *Review of the Nat'l Bank Preemption Rules: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 67 (2004) (quoting Brief for *Amicus Curiae* State Attorneys General, *Nat'l Home Equity Mortgage Ass'n v. OTS*, Civil Action No. 02-2506 (GK) at 10-12 (D.D.C. Mar. 21, 2003)).

Non-depository institution mortgage providers originated the vast majority of subprime mortgages from 2005 through 2007, accounting for a disproportionate percentage of defaults and foreclosures nationwide, with nearly one-half of the

mortgages they originated in some major markets now being in foreclosure. *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Financial Services*, 111th Cong. (2009) (statement of John C. Dugan, Comptroller of the Currency), *available at* www.house.gov/apps/list/hearing/financialsvcs_dem/occ_-_dugan031909.pdf.[9] This is largely due to the fact that "insured depository institutions, whether nationally- or state-chartered, are the most heavily regulated of all financial institutions, and they also tend to have the most conservative underwriting standards." *Subprime and Predatory Lending: New Regulatory Guidance, Current Market Conditions, and Effects on Regulated Financial Institutions: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 18, 183 (2007) (prepared statement of Emory W. Rushton, Senior Deputy Comptroller and Chief National Bank Examiner, OCC). Thus, "nonbank lenders and brokers that originate these loans have captured the largest

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[9] Examples of some of the most notorious contributors to the subprime crisis, all state-regulated mortgage lenders, include First Alliance Mortgage Company, *see Henry v. Lehman Commercial Paper, Inc.*, 471 F.3d 977 (9th Cir. 2006); Ameriquest Mortgage Company Multistate Settlement, *see* http://www.ameriquestmultistatesettlement.com/; and New Century Financial Corporation, *see* Final Report of Michael J. Missal, *In re New Century TRS Holdings Inc.*, Case No. 07-10416 (Bankr. D. Del. Feb. 29, 2008), *available at* http://pdfserver.amlaw.com/ca/newcentury01_0327.pdf.

share of the subprime market recently." *Id.* These lenders are – and always have been – subject to the oversight and enforcement jurisdiction of state officials.

Thus, States already have an enormous responsibility and burden to oversee and enforce state law against such state-regulated entities. The OCC's exclusive visitorial authority over national banks is no threat to the States' ability to fulfill that responsibility in a manner that will maximize protection for consumers. Quite to the contrary: "[p]rotection of consumers can be maximized if states and the OCC look for ways to spread their oversight to provide the most efficient, broadest coverage for consumers," *i.e.*, by respecting the OCC's exclusive enforcement authority over national banks. Williams 2003 Remarks to CFA, at 2.

Indeed, the OCC provided early and unmatched leadership on subprime lending. In 2001, the OCC and other federal agencies issued guidance intended to strengthen the examination and supervision of institutions with significant subprime lending programs. OCC Bulletin 2001-6, ("Expanded Guidance for Subprime Lending Programs"), (January 31, 2001), *available at* http://www.occ.treas.gov/ftp/release/2001-12a.pdf. Then, in 2003, the OCC issued an advisory letter to alert national banks and their operating subsidiaries to the risks that they could confront in dealing with subprime loans. OCC Advisory Letter 2003-3, "Avoiding Predatory and Abusive Lending Practices in Brokered and

Purchased Loans" (Feb. 21, 2003), *available at,* http://www.occ.treas.gov/ftp/advisory/2003-3.pdf. And to address emerging issues and questions related to certain subprime mortgage lending practices, in 2007, the OCC and the other federal financial regulatory agencies issued a Statement on Subprime Mortgage Lending, 72 Fed. Reg. 37,569 (July 10, 2007). As a result of these proactive OCC actions, the abuses in the subprime lending business – loan flipping, equity stripping, and making subprime loans that borrowers have no realistic prospect of repaying – have not sprouted and spread in the national banking system.

III. The States Have A Role In Assisting The OCC With Its Enforcement Efforts

Although Section 484 prohibits the States from enforcing against national banks any laws or regulations affecting the "business of banking," the OCC has reached out to the States to act as partners in ensuring that national banks comply with federal and state consumer protection laws, including fair lending laws. As the OCC has emphasized, "consumers benefit most when the OCC and the States focus on our respective areas of responsibility and find productive ways to cooperate." Dugan 2007 Testimony at 15. The OCC has worked to foster such cooperation through a variety of arrangements,

particularly with respect to sharing of information on consumer complaints.[10]

A. The OCC Has Entered Into Several Different Types Of Agreements With the States To Share Consumer Complaint Information

The OCC "encourages state officials to contact the OCC when they have information that would be relevant to the OCC in its supervision of national banks and their compliance with applicable laws." OCC Advisory Letter 2002-9, "Questions Concerning Applicability and Enforcement of State Laws: Contacts from State Officials," 1 (Nov. 25, 2002), *available at* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.

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[10] The OCC not only seeks ways to cooperate with the States to ensure comprehensive and effective protection for consumers, but it also works closely with the other federal regulators to achieve this objective. As stated in a declaration of policy regarding fair lending issued jointly by the OCC, HUD, and other federal regulators, "the appropriate federal financial institutions regulatory agency will engage in ongoing consultations with DOJ or HUD regarding coordination of each agency's actions. The Agencies will coordinate their enforcement actions and make every effort to eliminate unnecessarily duplicative actions * * * The financial institutions regulatory agencies also will discuss referrals on a case-by-case basis with DOJ or HUD to determine whether multiple actions are necessary and appropriate." Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,274 (Apr. 15, 1994).

The OCC has solicited compliance-related information from the States for more than 20 years. In 1988, the OCC entered into an Agreement on Sharing of Confidential Supervisory Information with New York. Under this agreement, the OCC and New York agreed "to exchange confidential supervisory information, including Reports of Examination." In subsequent years, the OCC expanded its information-sharing efforts, particularly with respect to consumer complaints. In 1998, the OCC and the National Association of Insurance Commissioners drafted a model agreement to share consumer complaint information involving national bank insurance sales activities. The OCC now has in place insurance information-sharing agreements with all 50 States, the District of Columbia, and Puerto Rico.

The OCC also has adopted broader means to receive referrals of consumer complaints regarding national banks from state attorneys general and state banking departments. The OCC has signed Memoranda of Understanding ("MOUs") providing for complaint referrals with the banking regulators of 45 States and Puerto Rico. *See, e.g.*, OCC 2008 Annual Report at 28-29 (discussing statistics through August 2008).

Under the most recent model MOU, developed in 2006 by the OCC and the Conference of State Bank Supervisors, if a State receives a complaint that pertains to a national bank, it will promptly share the complaint with the OCC and can monitor how it is

resolved. The first State to translate the model memorandum into an actual MOU with the OCC was New York, which did so in 2006. John C. Dugan, Comptroller of the Currency, Remarks before the Exchequer Club and Women in Housing and Finance (Jan. 17, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-4a.pdf.

The OCC recognizes that information-sharing with the States holds "real benefits for consumers." John C. Dugan, Comptroller of the Currency, Remarks before the Interagency Consumer Complaint Conference 7 (Oct. 15, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-111a.pdf. So the OCC has improved upon the model MOU procedures by introducing a web-based system, Complaint Referral Express, in 2008. This system further facilitates the exchange of customer complaint information between the OCC and state agencies.

B. The OCC Requires National Banks To Respond Properly To State Concerns

The OCC also ensures that national banks respond promptly and properly to complaints they receive directly from States. The OCC requires national banks "to resolve consumer complaints fairly and expeditiously, regardless of the source of the complaint – whether received directly from a consumer, referred from the OCC's CAG, or received from a state agency or official, or from any other source." OCC Advisory Letter 2004-2, "Consumer

Complaints Referred to National Banks From State Officials," 2 (Feb. 26, 2004), *available at* http://www.occ.gov/ftp/advisory/2004-2.doc. In particular, the OCC has instructed national banks that they "should not assert the OCC's exclusive visitorial authority as justification for not addressing customer complaints that are referred by state officials." *Id.*

Where complaints allege that national banks are engaging in any illegal, predatory, unfair or deceptive practices, the OCC encourages the States to bring complaints directly to the OCC so that the OCC may take appropriate action. In the case of a customer grievance, state officials are encouraged to send the complaint to the CAG. In the case of broader issues, such as the applicability of a particular state law to national banks generally, or where a state official has information that an individual national bank is engaged in a particular practice affecting multiple consumers that is alleged to be predatory, unfair or deceptive, the OCC asks the States to contact the OCC Chief Counsel's Office. State referrals regarding such issues have led to OCC investigations resulting in cessation of certain practices and civil money penalties.

C. The OCC Is Pursuing Other Methods To Collaborate With the States on Its Enforcement Efforts

The OCC and the States are experimenting with a number of other methods of collaborative

enforcement. One notable success has been in the area of community reinvestment laws. When the OCC is scheduled to conduct CRA examinations of national banks, it contacts local banking commissioners and solicits input regarding the banks' records of performance under applicable state community reinvestment laws. This enhances the OCC's ability to assess accurately each bank's federal CRA performance.

The OCC also works with state officials to ensure consistent enforcement against related entities. For example, as discussed *supra*, in 2000 the OCC entered into a landmark settlement with a large national bank that directed the bank to cease a number of unfair and deceptive practices and to pay at least $300 million to consumers harmed by those practices. At the same time, the San Francisco District Attorney entered into a similar agreement with the bank's parent company. These settlements culminated years-long collaborative investigations by the two agencies into violations of the Federal Trade Commission Act, the Federal Deposit Insurance Act, the California Business and Professions Code, and the Fair Credit Reporting Act.

In 2003, the OCC issued an order requiring another national bank to dissolve, following an OCC enforcement action freezing the assets of the bank's controlling shareholder and placing restrictions on the assets of the bank. These actions were the result of a coordinated investigation by the OCC, the New York Attorney General, the Securities and Exchange

Commission, and the Department of Labor, after New York uncovered a late-day trading scheme involving a New York investment management firm. As a result of the cooperation, not only were the illegal and abusive practices halted, but the investment management firm's financial resources were made available so that the national bank could unwind its affairs without undue disruption to its clients.

The OCC is continuing to work on innovative means to coordinate with the States to achieve shared objectives. For example, a pilot project in development with New York and Massachusetts will address instances in which national banks work with independent mortgage brokers. Through parallel examinations of a sample of national banks by the OCC, and examinations of a sample of state-licensed mortgage brokers by each State, the OCC and the States hope to develop a baseline of useful compliance information resulting from this unique congruence of state and federal jurisdictional interests. *See* Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, OCC, Remarks before the New York Bankers Ass'n 6 (July 11, 2007), *available at* http://www.occ.treas.gov/ftp/release/2007-72a.pdf.

The OCC's outreach to and cooperation with the States is further confirmation that the exclusivity of the OCC's visitorial powers over national banks strengthens, and in no way undermines, consumer protection throughout the United States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 1, 2009

AMICUS CURIAE BRIEF

No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF RESIDENTIAL MORTGAGE REGULATORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae American Association of Residential Mortgage Regulators ("AARMR") is the national association of state officials who regulate home mortgage lenders, servicers and brokers throughout the United States.[1] AARMR's members work within various state banking, consumer protection, and other agencies charged with enforcing state laws designed to prevent unfair and abusive practices related to residential mortgage loans. AARMR's mission includes facilitating the exchange of relevant information between and among state regulators; promoting a better understanding of mortgage regulation; developing model legislation; and sponsoring seminars and training programs.

The context surrounding this case is compelling. Our nation has experienced an economic boom and crash since January 2004, when the Office of the Comptroller of the Currency ("OCC") issued the preemptive regulation at the heart of this case. In particular, the past five years witnessed a reckless expansion and sudden collapse of the residential mortgage industry, followed by an unprecedented wave of foreclosures nationwide.

The OCC's regulation effected a significant change. For over 200 years, the States – acting in a realm

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

generally and wisely left to them by Congress – have enacted and enforced laws designed to protect consumers against abusive and unfair financial services practices. Recently, the States have played a leading role in combating predatory mortgage lending. With the recent enactment of the "S.A.F.E. Mortgage Licensing Act of 2008," 12 U.S.C. §§ 5101, *et seq.*, Congress expressly recognized the States' important role in this area by encouraging "the States, through the Conference of State Bank Supervisors and [AARMR], . . . to establish a Nationwide Mortgage Licensing System and Registry ["NMLS"] for the residential mortgage industry." *Id.* § 5102. The NMLS's purposes are to "enhance[] consumer protections" and "facilitate[] responsible behavior in the subprime mortgage market place." *Id.* The States have swiftly responded. "[T]he NMLS is now being utilized by 23 agencies in 22 states [and] [a]n additional 14 states have already committed to joining NMLS this year." Larry Collins, *The Mass Banker Interview*, Massachusetts Banker, 16, 18 (First Quarter 2009) (quoting Massachusetts Commissioner of Banks Steven L. Antonakes).

This is not a standard preemption case. The OCC regulation prevents state officials from enforcing valid state laws against national banks, even though no Act of Congress has preempted those laws. The regulation impairs the ability of AARMR's members and other state officials to enforce state mortgage lending laws. It also undermines the congressional policy of maintaining competitive equality between state-chartered banks and national banks. In upholding the regulation, moreover, the decision below ignored fundamental principles that underlie our nation's federal structure. This case is therefore of great

concern to AARMR, which submits this brief to assist the Court.

STATEMENT

The central issue in this case whether OCC possessed statutory authority to adopt a regulation barring state officials from enforcing valid, non-preempted state laws against national banks. The regulation declares that OCC has exclusive authority to "exercise visitorial powers with respect to national banks," except as otherwise provided by federal law. 12 C.F.R. § 7.4000(a)(1). As amended in 2004, the regulation purports to "interpret and implement" 12 U.S.C. § 484(a). 69 Fed. Reg. 1895, 1895 (Jan. 13, 2004). Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice" or exercised under congressional authority.

OCC's regulation defines "visitorial powers" to include "[e]nforcing compliance with any applicable federal or state laws" with respect to any activity that is permissible for national banks under federal law. 12 C.F.R. § 7.4000(a)(2)(iv). The regulation acknowledges, in accordance with § 484(a), that "[n]ational banks are subject to such visitorial powers as are vested in the courts of justice." *Id.* § 7.4000(b)(2). However, the regulation asserts that the "vested in the courts of justice" clause of § 484(a) does not allow any state official to use judicial process to "compel compliance by a national bank" with any state law affecting "activities authorized for national banks under Federal law." *Id.* The regulation therefore preempts the authority of state officials to use judicial proceedings to enforce valid state laws

against national banks. *See* 69 Fed. Reg. at 1895, 1899-1900. By virtue of 12 C.F.R. § 7.4006, the preemptive scope of § 7.4000 extends to operating subsidiaries of national banks. *See* 69 Fed. Reg. at 1900-02; *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20-22 (2007) (rejecting a challenge to the validity of § 7.4006).

This case involves the New York Attorney General's investigation of possible violations of N.Y. Executive Law § 296-a, a state law which bars racial and ethnic discrimination in mortgage lending. The investigation was prompted by data indicating that certain lenders made significantly higher percentages of high-interest loans to minorities. Respondents OCC and Clearing House Association blocked the investigation with respect to national banks by obtaining injunctive relief from the courts below, based on 12 C.F.R. § 7.4000. Pet. Brief at 12-17.

SUMMARY OF ARGUMENT

1. The Second Circuit Court of Appeals erred when it held that 12 C.F.R. § 7.4000 was entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and when the court refused to apply a presumption against preemption of Petitioner's authority to enforce N.Y. Executive Law § 296-a. In practical effect, the Second Circuit applied a presumption *in favor* of OCC's authority to preempt state laws – a presumption that could not be overcome without an unambiguous statement of congressional intent to forbid OCC's action. There are four reasons why this Court should reverse the Second Circuit's decision.

First, this Court should hold that *Chevron* does not apply to a federal agency regulation that purports to preempt a traditional regulatory power of the States. The power of Congress to adopt legislation preempting "areas traditionally regulated by the States . . . is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, the judiciary should undertake a *de novo* review of each preemptive regulation to ensure that the federal-state balance is not altered without a clearly-expressed determination by Congress.

Second, the Second Circuit should have applied a presumption *against* preemption because (i) the States have a long history of regulating banks and other financial institutions for the purpose of protecting consumers and assuring fair lending, and (ii) this Court has repeatedly upheld the general application of state laws to national banks.

Third, OCC has a financial self-interest in issuing preemptive regulations. The agency's budget is mainly funded by national bank assessments. OCC has advertised its preemption initiatives as a major reason why large, multistate banks, which pay larger assessments, should operate under national charters. This economic motive should disqualify OCC preemptive rules from attracting any deference.

Fourth, OCC's regulation raises serious questions under the Tenth Amendment because it preempts the States' sovereign authority to enforce their own laws. This Court should therefore deny OCC's claim to *Chevron* deference and should invalidate § 7.4000 in

the absence of any clear statement of supporting congressional intent.

2. Even if *Chevron* applies to this case, § 7.4000 does not qualify for deference unless it was "promulgated pursuant to authority Congress has delegated to the [OCC]." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). OCC does not possess the requisite delegated authority, because the National Bank Act ("NBA"), 12 U.S.C., §§ 1-216d, does not empower OCC to preempt the States' authority to enforce valid State laws against national banks.

Ever since the NBA was enacted in 1864, Congress has provided "the courts of justice" with independent visitorial powers over national banks. 12 U.S.C. § 484(a). Neither § 484(a) nor any other provision of the NBA restricts the authority of state officials to sue national banks for violations of state laws. In fact, the NBA provides that national banks may "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." *Id.* § 24 (Fourth). OCC's limited rulemaking powers under 12 U.S.C. §§ 371(a) and 93a do not authorize a regulation barring lawsuits by state officials to enforce valid state laws against national banks.

For more than a century, courts have affirmed the authority of state officials to sue national banks for violations of state law. In *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), for example, this Court upheld the State's power to "vindicate and enforce its own law" against a national bank, notwithstanding the federal government's claim of exclusive authority to bring judicial enforcement proceedings against the bank. *Id.* at 660. This case

presents the same situation as *St. Louis* and calls for the same result.

ARGUMENT

I. OCC's REGULATION SHOULD NOT RECEIVE *CHEVRON* DEFERENCE.

A. *Chevron* Should Not Apply to a Federal Agency Regulation That Preempts a Traditional Regulatory Power of the States.

1. *Chevron* Deference Should Be Denied When a Federal Agency Asserts Authority to Preempt a Traditional State Regulatory Power.

This Court has never ruled definitively on the question of whether federal agencies' preemptive regulations are entitled to receive *Chevron* deference. However, it has acknowledged that serious doubts exist concerning the propriety of such deference. For example, in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the petitioner contended that a reviewing court must "make its own interpretation of [the federal statute] that will avoid (to the extent possible) pre-emption of state law." *Id.* at 743-44. After noting the petitioner's argument, the Court assumed without deciding that the question of a statute's preemptive effect "must always be decided *de novo* by the courts." *Id.* at 744.

In *Watters v. Wachovia Bank, N.A.*, the petitioner similarly argued that "because preemption is a legal question for determination by the courts, [12 C.F.R.]

§ 7.4006 should attract no deference." 550 U.S. 1, 20 (2007). The majority opinion did not directly address the petitioner's argument. Instead, it held that "the level of deference owed to the regulation is an academic question," *id.*, because "the NBA itself – independent of OCC's regulation – preempts the application of the pertinent Michigan laws to national bank operating subsidiaries." *Id.* at 21 n.13.

The three dissenting Justices in *Watters* did address the *Chevron* issue. They maintained that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls for *something less than Chevron deference*." *Id.* at 41 (Stevens, J., dissenting, joined by Roberts, C.J., and Scalia, J.) (emphasis added). The dissenting Justices also stated that the Court should have rejected OCC's preemption claim in the absence of a "clear and manifest purpose of Congress" because "[c]onsumer protection is quintessentially a field which the States have traditionally occupied." *Id.* at 35-36 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (internal quotation marks omitted).

This Court should now hold that *Chevron* deference is not appropriate when a federal agency issues an order or rule declaring that a traditional regulatory power of the States is preempted. Instead, the courts should undertake a *de novo* review of agency preemption determinations to ensure that preemption issues are resolved in accordance with the Constitution's allocation of federal and state powers. The power of Congress to adopt legislation preempting "areas traditionally regulated by the States . . . is an extraordinary power in a federalist system. It is a power that we must assume Congress does not

exercise lightly." *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991). This Court has therefore required Congress to "make its intention clear and manifest if it intends to pre-empt the historic powers of the States." *Id.* at 461 (citations and internal quotation marks omitted). *See also United States v. Lopez,* 514 U.S. 549 (1995), where Justices Kennedy and O'Connor observed that "the whole jurisprudence of preemption" is one of the important ways in which "this Court has participated in maintaining the federal balance." *Id.* at 578 (Kennedy, J., concurring, joined by O'Connor, J.).

Although *Chevron* deference was not at issue in *Gregory*, the Court declared that "[w]e must be absolutely certain that Congress intended" to adopt legislation that alters the "state-federal balance." *Gregory,* 501 U.S. at 464. As *Gregory* pointed out, to "give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." *Id.* (quoting Laurence H. Tribe, *American Constitutional Law* § 6.25, p. 480 (2d ed. 1988), and citing *Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985)).

In a leading decision involving the NBA, this Court held that the success of a preemption claim depends on whether "language in the federal statute . . . reveals an *explicit* congressional intent to pre-empt state law" or, if not, whether "the federal statute's 'structure and purpose,' or nonspecific statutory language, nevertheless reveal a *clear, but implicit*, pre-emptive intent." *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31 (1996) (emphasis added) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525

(1977)). *Barnett* did not consider the issue of *Chevron* deference. However, applying the *Chevron* framework to an agency's preemptive ruling directly conflicts with the preemption standard *Barnett* articulated, because *Chevron* permits a reviewing court to uphold an agency's interpretation of federal law even if the governing statute is "silent or ambiguous." *Chevron*, 467 U.S. at 843.

The decision below demonstrates that granting *Chevron* deference to preemptive orders and rules will give federal agencies virtually unlimited discretion to override state law as long as federal statutes do not unambiguously forbid the agencies' preemption claims. The Second Circuit stated that "[a]lthough the precise scope of 'visitorial' powers is not entirely clear from the text of [12 U.S.C.] § 484(a), . . . we cannot agree . . . that the statute clearly precludes the interpretation the OCC has adopted." Pet. App. 21a. Thus, the Second Circuit's application of *Chevron* deference effectively created a presumption *in favor* of OCC's authority to preempt state law. That result, however, is inconsistent with *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), in which this Court stated that "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Id.* at 369; *see also id.* at 374 ("an agency literally has no power to act, let alone . . . pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it").

The judiciary's role in preserving the state-federal balance within our constitutional framework strongly counsels against granting *Chevron* deference when a court evaluates the validity of an agency's preemption

determination.[2] Given our nation's fundamental commitment to federalism, a reviewing court should not rely on an agency's interpretation of an "ambiguous" statute to justify a finding that Congress intended to preempt a traditional regulatory power of the States.

2. State Laws Regulating Financial Institutions to Protect Consumers and Assure Fair Lending Are Within the States' Traditional Police Powers and Should Not Be Preempted Without a Clear Expression of Congressional Intent.

Pursuant to their police powers, the States have long regulated banks and other financial institutions for the purpose of protecting consumers and assuring fair lending. In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Court declared:

> We readily accept the submission that, both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . [S]ound financial institutions and honest financial practices are essential to the health of

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[2] *See* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. Rev. 695, 698-99, 705-06 (2008) (arguing that *Chevron* deference should not apply to federal agency preemption determinations because agencies lack the requisite "expertise on important issues of state autonomy and federalism," *id.* at 698); *accord*, Nicholas Bagley, *Note: The Unwarranted Regulatory Preemption of Predatory Lending Laws*, 79 N.Y.U. L. Rev. 2274, 2293-97 (2004).

> any State's economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have chartered banks and have actively regulated their activities.

Id. at 38; accord, *Northeast Bancorp v. Bd. of Governors*, 472 U.S. 159, 177-78 (1985).

This Court has repeatedly upheld the general applicability of state laws to national banks. *Atherton v. FDIC*, 519 U.S. 213 (1997) ruled that "federally chartered banks are subject to state law." *Id.* at 222. In support of that principle, *Atherton* quoted decisions reaching back to an 1870 case, which held that national banks

> are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when State law incapacitates the [national] banks from discharging their duties to the federal government that it becomes unconstitutional.

Id. at 222-23 (quoting *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1870)).

Likewise, *Barnett* held that States have "the power to regulate national banks" where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." 517 U.S. at 33.

In *Watters,* the Court similarly recognized that "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the NBA." 550 U.S. at 11. In two earlier decisions, the Court explained that "the operation of general state laws upon the dealings and contracts of national banks" is the "rule," while preemption is an "exception" that applies only when state laws "expressly conflict with the laws of the United States or frustrate the purpose for which national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States." *First Nat'l Bank in St. Louis,* 263 U.S. at 640, 656 (1924) (quoting *McClellan v. Chipman,* 164 U.S. 347, 357 (1896)).[3]

Congress has preserved the vitality of the dual banking system by relying on state law to help maintain a basic parity of competitive opportunities between state and national banks.[4] This "policy of equalization" has been carried out by applying state laws to national banks in two ways – first, by

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[3] *Accord, Anderson Nat'l Bank v. Luckett,* 321 U.S. 233, 248 (1944) ("This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions"); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 566 (1934) ("[A] national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law").

[4] *See* Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection,* 23 Ann. Rev. Banking & Fin. L. 225, 253-65 (2004).

"expressly incorporat[ing] state-law standards into several federal statutes," and second, "through statutory silence [that] permits state laws to govern other aspects of the operations of national banks *except* in situations where a state law creates an irreconcilable conflict with federal law."[5]

Congress expressed its strong support for the presumptive application of state laws to national banks when it passed the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 ("Riegle-Neal Act"). The Riegle-Neal Act requires interstate branches of national banks to comply with host state laws in four broadly-defined areas – community reinvestment, consumer protection, fair lending and intrastate branching – unless federal law preempts the application of such laws to national banks. 12 U.S.C. § 36(f)(1)(A). Explaining why state laws are generally applicable to national banks, the conference report on the Riegle-Neal Act concluded:

> States have a strong interest in the activities and operations of depository institutions doing business within their jurisdictions, regardless of the type of charter an institution holds. In particular, States have a legitimate interest in protecting the rights of their consumers, businesses and communities. . . .

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[5] *Id.* at 266. *See Lewis v. Fidelity & Deposit Co.*, 292 U.S. at 564-66 (describing both methods for applying state laws to national banks and observing that the NBA reflects a congressional "policy of equalization" between the national and the state banking systems).

. . . .

> Under well-established judicial principles, national banks are subject to State law in many significant respects. . . . Courts generally use a rule of construction that avoids finding a conflict between the Federal and State law where possible. The [Riegle-Neal Act] does not change these judicially established principles.[6]

By referring to "judicially established principles" under which "national banks are subject to State law in many significant respects," the Riegle-Neal conferees clearly indicated their agreement with judicial decisions such as *First Nat'l Bank in St Louis, McClellan, Luckett, Lewis v. Fidelity & Deposit Co.* and *Nat'l Bank v. Commonwealth*, all of which upheld the general application of state laws to national banks.

The Riegle-Neal Act expressly confirms the general applicability of state fair lending laws to multistate national banks. 12 U.S.C. § 36(f)(1)(A). Additional congressional support for state fair lending laws appears in the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f ("ECOA"). ECOA prohibits all "creditors" – a category that includes national and state banks – from discriminating on the basis of several characteristics, including race and national origin. *Id.* §§ 1691(a), 1691a(e). ECOA explicitly preserves the States' authority to enact laws prohibiting lending discrimination that are consistent with the federal statute. Notably, ECOA upholds state

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[6] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.) *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

laws that give "greater protection" to borrowers than the protection afforded under ECOA. *Id.* § 1691d(f).

When Congress endorsed the application of state laws to national banks in the Riegle-Neal Act, it acted consistently with the presumption against preemption that this Court has applied in fields of traditional state regulation. For example, in *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Court applied a "presumption against finding pre-emption of state law in areas traditionally regulated by the States" in order to ensure that "the historic police powers of the States" are not "superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 101 (quoting *Rice*, 331 U.S. at 230) (internal quotation marks omitted). The Court also affirmed that state laws prohibiting "unfair business practices" fall within "an area traditionally regulated by the States." *Id.*[7] As the dissenting Justices pointed out in *Watters*, the presumption in favor of the validity of state regulation is consistent with this Court's decisions under the NBA. *See* 550 U.S. at 23-26, 31, 35-38 (Stevens J., dissenting, joined by Roberts, C.J., and Scalia, J.).

Accordingly, state laws protecting consumers and assuring fair lending are valid exercises of the States' historic police powers over financial institutions. Such

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[7] For other decisions applying a presumption against preemption in affirming the validity of state consumer protection laws, *see e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516-20, 525-30 (1992) (applying presumption in upholding state laws providing remedies for breach of contract, fraud and misrepresentation); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) (similarly upholding a state law "designed to prevent the deception of consumers").

laws presumptively apply to national banks. As the Second Circuit acknowledged, all parties agree that the NBA does *not* preempt N.Y. Executive Law § 296-a. *See* Pet. App. 15a, 29a. This Court should therefore invalidate OCC's regulation preempting New York's authority to enforce § 296-a because there is no clear expression of supporting congressional intent. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

B. OCC's Preemptive Rules Should Not Qualify for *Chevron* Deference Because They Are Tainted by the Agency's Financial Self-Interest.

OCC's financial motive to issue preemptive rules provides a special and compelling reason for rejecting its appeal for *Chevron* deference. Section 7.4000 is one of a series of preemptive rules and orders that OCC has issued in recent years. *See, e.g., Watters*, 550 U.S. at 20-21 (discussing 12 C.F.R. § 7.4006, which preempts the application of state laws to operating subsidiaries of national banks); 69 Fed. Reg. 1904 (2004) (adopting 12 C.F.R. §§ 7.4007-7.4009 and 34.4, which preempt the application of a wide range of state laws to national banks). In defending OCC's preemption initiatives, a former head of the agency declared that preemption of state law is "a significant benefit of the national [bank] charter – a benefit that the OCC has fought hard over the years to preserve."[8]

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[8] Speech by Comptroller of the Currency John D. Hawke, Jr., on Feb. 12, 2002, quoted in Wilmarth, *supra* note 4, at 236, 274.

OCC has a strong economic interest in persuading the largest banks to operate under national charters. OCC's budget is almost entirely funded by national bank assessments, and the biggest banks pay the highest assessments.[9] In response to OCC's aggressive preemption efforts, several large, multistate banks have converted from state to national charters in recent years, thereby producing a significant increase in OCC's assessment revenues.[10]

Moreover, OCC's record of enforcing consumer protection laws has been described as a "long history of inaction," "weak" and "unimpressive."[11] Publicly available information indicates that, during 1995-2007, OCC issued only 13 public enforcement orders against national banks for violations of consumer protection laws.[12] Only one of those orders included a

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[9] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 93-94 (Nov. 2008); Wilmarth, *supra* note 4, at 276.

[10] Bar-Gill & Warren, *supra* note 9, at 81-83, 93-94 (citing charter conversions by three large banks, which moved one trillion dollars of assets from the state banking system to the national banking system); Wilmarth, *supra* note 4, at 233-36, 274-79, 289-93.

[11] Bar-Gill & Warren, *supra* note 9, at 90-95 (quote at 94); Amy Quester & Kathleen Keest, *Looking Ahead After* Watters v. Wachovia Bank: *Challenges for Lower Courts, Congress, and the Comptroller of the Currency*, 27 Rev. Banking & Fin. L. 187, 195-97 (2008) (quote at 195); Wilmarth, *supra* note 4, at 232 (quote), 274-77, 289-93, 310-16, 351-56.

[12] *See* Bar-Gill & Warren, *supra* note 9, at 92-93; Wilmarth, *supra* note 4, at 353, 355-56; Stephanie Mencimer, "No Account," *New Republic*, Aug. 27, 2007, at 14.

charge that the bank violated state laws.[13] In that one case, OCC took action only after the public became aware that a California prosecutor was investigating the offending bank.[14]

The States' record presents a dramatic contrast. During the past decade, more than thirty states have enacted laws to combat predatory lending.[15] The New York Attorney General and other state officials have vigorously used their enforcement powers to protect consumers and prosecute financial service providers for a wide range of unlawful practices.[16] In 2003 alone, "state bank supervisory agencies performed more than 20,000 investigations in response to consumer complaints about abusive lending practices, and those

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[13] *See In re Providian Nat'l Bank*, June 28, 2000, 2000 OCC Enf. Dec. LEXIS 55, at *1 (alleging violations of California statutes prohibiting unfair business practices).

[14] Wilmarth, *supra* note 4, at 316 & n.357; "Correspondence," *New Republic*, Oct. 8, 2007, at 7 (response by Stephanie Mencimer to letter from Comptroller of the Currency John C. Dugan).

[15] *See* Baher Azmy, *Squaring the Predatory Lending Circle*, 57 Fla. L. Rev. 295, 300-03, 361-81, 391-400 (2005); Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. Cin. L. Rev. 1303, 1308-10, 1319-22, 1359-68 (2006).

[16] *E.g.*, Wilmarth, *supra* note 4, at 316, 348-52, 354-55; Amir Efrati & Aaron Lucchetti, "U.S. News: Cuomo Blazes Own Trail as Wall Street Cop," *Wall St. J.*, Aug. 11, 2008, at A3; Brooke Masters, "In Spitzer's Footsteps: Cuomo Trains His Sights On Financial Services," *Fin. Times*, June 5, 2007, at 1.

investigations produced more than 4,000 enforcement actions."[17]

OCC has substantially obstructed the States' efforts to protect consumers from predatory lending practices. By preempting state laws and state enforcement proceedings, OCC has (i) undermined the effectiveness of state predatory lending laws,[18] and (ii) contributed to the severity of the current credit crisis by "stifling . . . prescient state enforcers and legislators" who tried to prevent irresponsible lending.[19] For example, OCC issued rulings declaring that Georgia officials were preempted from applying the Georgia Fair Lending Act not only to national banks and their operating subsidiaries, but also to

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[17] Wilmarth, *supra* note 4, at 316 (quoting 2004 House budget committee document); *see also* Eric Nalder, "Mortgage System Crumbled While Regulators Jousted," *Seattle Post-Intelligencer*, Oct. 11, 2008, at A1 (reporting that "States . . . took 3,694 enforcement actions against mortgage lenders and brokers in 2006 alone, according to congressional testimony").

[18] *E.g.*, Bar-Gill & Warren, *supra* note 9, at 81-82, 90-95; Forrester, *supra* note 15, at 1339-42, 1349-53; Quester & Keest, *supra* note 11, at 223-37; Wilmarth, *supra* note 4, at 306-16, 348-52.

[19] *E.g.*, Robert Berner & Brian Grow, "They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington," *Bus. Wk.*, Oct. 20, 2008, at 36, 38; *see also* Nicholas Bagley, "Subprime Safeguards We Needed," *Wash. Post*, Jan. 25, 2008, at A19; Nalder, *supra* note 17 (reporting that "[w]hen [Washington] state investigators spotted questionable loan practices, the feds rejected their help and informed the state that it had no business looking into the affairs of federally chartered institutions").

mortgage brokers who arranged loans funded at closing by national banks or their subsidiaries.[20]

OCC's anemic enforcement record is consistent with its strong budgetary incentives to follow policies that encourage large banks to operate under national charters. Given OCC's self-interest in adopting preemptive regulations, those rules should be denied any deference under *Chevron*.[21]

Moreover, OCC does not have adequate resources to assume duties that fall well outside its core responsibility for ensuring the safety and soundness of national banks. Recent events demonstrate that OCC should focus its attention on improving its supervisory procedures and preventing bank failures. For example, the Treasury Department's Office of Inspector General issued a highly critical audit report in November 2008, describing numerous shortcomings in OCC's supervision with respect to the failed ANB Financial, N.A., of Bentonville, Arkansas. *See* Audit Report OIG-09-013, at 13-23 (Nov. 25, 2008). OCC should not arrogate to itself additional consumer protection responsibilities that are better handled by the States.

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[20] Preemption Determination and Order, 68 Fed. Reg. 46,264 (Aug. 5, 2003); OCC Interpretive Letter No. 1002, May 13, 2004, from Comptroller of the Currency John D. Hawke, Jr. to Georgia Banking Commissioner David G. Sorrell.

[21] Wilmarth, *supra* note 4, at 232-33, 293-98; *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203, 206-07, 286 (2004).

C. OCC's Regulation Raises Serious Questions Under the Tenth Amendment and Should Not Be Upheld in the Absence of a Clear Statement of Congressional Intent.

The challenged regulation bars the States from enforcing state laws such as N.Y. Executive Law § 296-a against national banks or their operating subsidiaries. *See* 12 C.F.R. § 7.4000 (a)(2)(iv) & (b)(2). The regulation therefore infringes upon the States' sovereign power to enforce their laws and raises serious questions under the Tenth Amendment.

The authority of States to enforce their criminal laws "derive[s] from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Heath v. Alabama,* 474 U.S. 82, 89 (1985). In *United States v. Wheeler,* 435 U.S. 313 (1978), *superseded by statute on other grounds*, Pub. L. No. 102-137, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301 (2)), *as recognized in United States v. Lara*, 541 U.S. 193, 197-98 (2004), this Court affirmed that each State "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *Id.* at 320.

The majority opinion below, however, concluded that OCC's regulation "preserves state sovereignty" simply because non-preempted state laws "remain enforceable by private parties, as well as by the OCC itself." Pet. App. 29a. That conclusion is plainly at odds with this Court's statements in *Heath* and *Wheeler*. It also conflicts with practical reality. As

Judge Cardamone observed in his dissent below, "[i]t is difficult to imagine a more core aspect of state sovereignty than the authority to pass and enforce valid nonpreempted state laws." Pet. App. 55a (Cardamone, J., dissenting). *See also Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (stating the common sense proposition that "[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them") (quoting *McClesky v. Zant*, 499 U.S. 467, 491 (1991)).

OCC's *concurrent* authority to enforce state laws against national banks under 12 U.S.C. §1818 does not extinguish the States' sovereign power to enforce their laws against national banks. This Court has repeatedly held that a State's sovereign interest in enforcing its criminal laws cannot be diminished by the fact that other entities have power to enforce similar laws against the same persons. *Heath* declared that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by *another* State's enforcement of *its* own laws." 474 U.S. at 93 (emphasis added). *See also Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (stating that "[i]t would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States") (footnote omitted).

OCC's claim of exclusive authority to enforce state laws threatens to mislead the public concerning the effectiveness of state enforcement of state laws protecting consumers of financial services. *See* Pet.

App. 59a (Cardamone, J., dissenting) (noting that 12 C.F.R. § 7.4000 "confuses which governmental entity citizens should hold accountable for the enforcement of state laws against national banks"). OCC's regulation therefore diminishes political accountability, which is one of the crucial checks and balances within our federal system.

In *New York v. United States*, 505 U.S. 144 (1992), this Court invalidated a comparable federal invasion of state sovereignty. *New York* struck down a federal law that used coercive measures to interfere with the States' regulatory and enforcement authority. The challenged statute in *New York* would have forced state governments to carry out a congressionally-mandated radioactive waste disposal program. This Court held that the provision was unconstitutional because it "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (internal quotation marks and citation omitted). This anti-commandeering principle was based on the Court's concern that political accountability is "diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

The federal law struck down in *New York* was the mirror image of the OCC regulation at issue here. In *New York*, Congress *compelled* the States to implement a *federal* mandate. In this case, 12 C.F.R. § 7.4000 *prevents* the States from enforcing a *State* mandate. In each case, the federal provision is unlawful because it treats the States as "mere political subdivisions of the United States" and fails to

recognize the "'residuary and inviolable sovereignty,'. . . reserved explicitly to the States by the Tenth Amendment." *Id.* at 188 (quoting *The Federalist* No. 39, p. 245 (C. Rossiter ed. 1961)).

In an analogous case, this Court refused to give *Chevron* deference to an agency regulation because the rule interpreted a federal statute in a manner that "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). The Court "reject[ed] the request for administrative deference" in order to "avoid the significant constitutional and federalism questions" created by the agency's interpretation. *Id.* at 174. The Court then struck down the regulation in the absence of "a clear statement from Congress that it intended . . . to readjust the federal-state balance." *Id.*

For the same reasons, 12 C.F.R. § 7.4000 should not receive *Chevron* deference. As shown above, § 7.4000 significantly alters the state-federal balance by preempting the States' sovereign authority to enforce valid state laws against national banks. Moreover, as demonstrated below, § 7.4000 is unsupported by any clear statement of congressional intent.

II. EVEN IF *CHEVRON* APPLIES, OCC'S REGULATION SHOULD NOT RECEIVE DEFERENCE.

A. Congress Has Not Authorized OCC to Prohibit States from Enforcing Valid State Laws.

This Court has made clear that "*Chevron* deference . . . is not accorded [to a regulation] merely because the statute is ambiguous and an administrative [agency] is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Instead, the regulation must be "promulgated pursuant to authority Congress has delegated to the [agency]." *Id.*; *accord, Adams Fruit Co. v. Barrett,* 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"). The challenged regulation is invalid because Congress has not authorized OCC to bar the States from enforcing valid state laws.

The Second Circuit relied primarily on 12 U.S.C. § 484(a). That reliance was misplaced. The preemption which derives from § 484(a) is limited to state laws which intrude on OCC's "visitorial powers" and does not extend to the enforcement of state fair lending laws such as the N.Y. Executive Law § 296-a. Section 484(a) provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or [exercised by Congress or a committee thereof]." The original NBA, enacted in 1864 (the "1864 Act"), included a similar limitation on "visitorial" powers in the same section that authorized OCC to make periodic examinations of national banks. *See* Act of June 3, 1864, c. 106, § 54, 13 Stat. 116. The 1864 Act

also empowered OCC to make special examinations of national banks in formation to determine whether embryonic banks should be given certificates of authority to "commence the business of banking." Act of June 3, 1864, *supra*, §§ 17, 18, 13 Stat. 104, 105.

The current NBA provides OCC with the same examination and chartering powers. *See* 12 U.S.C. §§ 481, 26, 27. After noting OCC's authority to charter and examine national banks, this Court in *Watters* construed § 484(a) in a manner consistent with that authority, holding that it precludes the States from imposing "licensing, registration, and inspection requirements" on national banks. 550 U.S. at 14-15.

The 1864 Act, like the current NBA, authorized OCC to appoint receivers for insolvent national banks or banks that fail to redeem their circulating notes. *See* Act of June 3, 1864, *supra*, §§ 31, 32, 50, 13 Stat. 108-09, 114-15 (codified as amended in 12 U.S.C. §§ 191, 192). The power to appoint receivers is a significant source of administrative enforcement authority for OCC. *See Cooper v. O'Connor*, 99 F.2d 135, 139 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938) (noting that OCC is empowered to place a receiver "in complete charge" of a national bank).[22] In *Watters*, after considering OCC's administrative enforcement powers, this Court concluded that a State "cannot confer on its [banking] commissioner examination and enforcement authority over mortgage lending, or any

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[22] Since 1966, OCC has exercised additional administrative enforcement powers over national banks under 12 U.S.C. § 1818, including the authority to enforce applicable state laws. *See infra* note 24.

other banking business done by national banks." 550 U.S. at 14-15 (footnote omitted).[23]

Watters is consistent with *Guthrie v. Harkness*, 199 U.S. 148 (1905). *Guthrie* explained that OCC's administrative powers of "investigation" (through bank examinations) and "appointment of a receiver" were the key "visitorial powers" referred to in 12 U.S.C. § 484(a). *Id.* at 159. However, *Guthrie* also observed that "visitorial powers . . . 'vested in the courts of justice'" are "*expressly excepted* from the inhibition of [§ 484(a)]." *Id.* (emphasis added). As shown *infra* in Part II.B., the courts routinely permitted lawsuits by state officials to enforce state laws against national banks until 2004, when OCC amended 12 C.F.R. § 7.4000.

The "vested in the courts of justice" clause originally appeared in § 54 of the 1864 Act, which affirmed that "the several courts of law and chancery" could exercise "visitorial powers" over national banks. Act of June 3, 1864, *supra*, § 54, 13 Stat. 116. The current language of § 484(a), like § 54, does not restrict the authority of state officials to bring judicial enforcement actions against national banks. The plain language of § 484(a) therefore contradicts 12 C.F.R.

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[23] *Watters* dealt only with the question of whether a state official could exercise certain types of administrative enforcement powers over national banks and their operating subsidiaries. *See* 550 U.S. at 9-10 (describing the administrative powers of Michigan's banking commissioner). *Watters* did not consider whether § 484(a) bars the States from enforcing valid state laws against national banks by using other methods, including judicial proceedings. As the Second Circuit acknowledged, "*Watters* does not directly address the questions at issue here." Pet. App. 20a.

§ 7.4000(b)(2), which bars state officials from filing suits in "the courts of justice" to enforce state laws against national banks.

Other provisions of the NBA confirm that Congress has not limited the right of state officials to sue national banks for violations of state law. The 1864 Act, like the current NBA, included a provision authorizing each national bank to "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." Act of June 3, 1864, § 8, 13 Stat. 101 (codified as amended at 12 U.S.C. § 24 (Fourth)). The 1864 Act also gave federal and state courts concurrent jurisdiction over "suits, actions, and proceedings" against national banks. *Id.*, § 57, 13 Stat. 116-17.

The 1864 Act contained only two exceptions to this general grant of concurrent jurisdiction to federal and state courts over suits against national banks. First, a proviso to § 57 stipulated that federal courts would have exclusive jurisdiction over "all proceedings to enjoin the [OCC]." *Id.*, 13 Stat. 117. Second, § 53, like the current NBA, authorized OCC to sue in federal court to rescind the charter of a national bank if its directors "knowingly violate, or knowingly permit any of [its] officers, agents, or servants . . . to violate" the NBA. *Id.* § 53, 13 Stat. 116 (codified as amended at 12 U.S.C. § 93(a)). Neither § 57 nor § 53 restricted the authority of state officials to file lawsuits against national banks in state or federal courts.[24]

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[24] Section 53 of the 1864 Act – like its successor, 12 U.S.C. § 93(a) – did not authorize OCC to sue national banks for violations of state law. Since 1966, Congress has empowered OCC to (i) issue

The provisions of § 57, as modified by later statutes, were ultimately codified at 12 U.S.C. § 1348.[25] Section 1348 gives federal district courts exclusive original jurisdiction over (i) suits filed by federal officials against national banks, (ii) proceedings to wind up the affairs of national banks, and (iii) actions by national banks "to enjoin the Comptroller of the Currency or any receiver acting under his direction." However, § 1348 also provides that national banks "shall, for the purposes of *all other actions* by or *against them*, be deemed citizens of the States in which they are respectively located." 12 U.S.C. § 1348 (emphasis added). Accordingly, § 1348 preserves the general concurrent jurisdiction of state and federal courts over suits involving national banks, and § 1348 does not bar suits by state officials.

OCC's regulation conflicts with the NBA, and it therefore exceeds OCC's rulemaking authority. Under 12 U.S.C. § 371(a), OCC may issue regulations that prescribe "restrictions and requirements" for real estate loans made by national banks. However,

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administrative enforcement orders against national banks based on violations of federal or state law, and (ii) seek judicial enforcement of such orders. *See* 12 U.S.C. § 1818(b), (c), (d), (i). However, § 1818 does not restrict the authority of state officials to sue national banks for violations of state laws. When Congress adopted the 1966 amendments to § 1818, it indicated that it "did not wish to take any action which would do violence to the balance between State and Federal functions and responsibilities which underlies the dual banking system." S. Rep. No. 89-1482 (1966), reprinted in 1966 U.S.C.C.A.N. 3532, 3538.

[25] *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 559-61, 565-67 (1963); *see also Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 310-12 (2006).

§ 371(a) requires national banks to comply with the uniform interagency real estate lending standards established under 12 U.S.C. § 1828(*o*). One of the interagency standards requires national banks to adopt lending policies which promote "[c]ompliance with *all real estate laws and regulations*, including *anti-discrimination laws*." 12 C.F.R. Pt. 34, Subpt. D, App. A (OCC's version of uniform standards, under the heading "Loan Portfolio Management Considerations") (emphasis added). On its face, this interagency standard requires national banks to comply with "all" non-preempted state laws applicable to real estate loans, including N.Y. Executive Law 296-a. Accordingly, § 371(a) does not empower OCC to adopt a regulation that undermines the compliance duties of national banks by blocking New York's ability to enforce § 296-a.

Separately, under 12 U.S.C. § 93a, OCC may adopt rules "to carry out the responsibilities of the office." In *Gonzales v. Oregon*, this Court held that a similarly-worded federal statute, 12 U.S.C. § 871(b), did not authorize the Attorney General to "make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." 546 U.S. at 258. The Court explained that the Attorney General's authority to adopt rules executing "his functions" under § 871(b) did not empower him to issue a preemptive regulation that went "well beyond the statute's specific grants of authority." *Id.* at 264-65. Like § 871(b), 12 U.S.C. §§ 371(a) and 93a are "generic authorizations of rulemaking authority, . . . and neither says a word about preemption." *Watters*, 550 U.S. at 39 n.23 (Stevens, J., dissenting). Those provisions therefore "provide no textual foundation for the OCC's assertion

of preemption authority." *Id.; see also* Wilmarth, *supra* note 4, at 272-73, 299-306, 311-14 (describing OCC's lack of authority to adopt preemptive regulations under 12 U.S.C. §§ 93a and 371(a)).

OCC has also asserted that § 36(f)(1)(B) of the NBA supports its claim of "exclusive visitorial authority" over national banks. 69 Fed. Reg. 1895, 1897 (Jan. 13, 2004). Section 36(f)(1)(B) provides that state laws applicable to interstate branches of national banks "shall be enforced" by OCC. 12 U.S.C. § 36(f)(1)(B). For two reasons, however, § 36(f)(1)(B) does not sustain OCC's claim or the regulation at issue.

First, the provision applies only to interstate branches of national banks. Therefore, it cannot be construed to repeal by implication the "vested in the courts of justice" clause of § 484(a), which applies to national banks *in their entirety*, including their main offices and home state branches. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (internal quotation marks and citation omitted).

Second, the conference report on the 1994 legislation that enacted § 36(f)(1)(B) affirmed that "States have a legitimate interest in protecting the rights of their consumers, businesses, and communities," and that "Congress does not intend that [the 1994 law] . . . weaken States' authority to protect the interests of their consumers, businesses, or

communities."[26] The conference report further declared that "[u]nder well-established judicial principles, national banks are subject to State law in many significant respects. . . . The [1994 law] does not change these judicially established principles."[27] Thus, when Congress adopted § 36(f)(1)(B) in 1994, it clearly did not intend to override the numerous court decisions (discussed below) that had previously upheld the States' authority to enforce valid state laws against national banks.

B. The Courts Have Repeatedly Upheld the States' Authority to Use Judicial Proceedings to Enforce Their Laws Against National Banks.

In two cases decided soon after Congress passed the 1864 Act, this Court affirmed the right of state and local officials to sue national banks to enforce valid, non-preempted state laws. Neither decision mentioned the NBA's restriction on "visitorial powers."

In *Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362-63 (1870), the Court held that Kentucky's lawsuit to collect taxes from a national bank was "no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it." In *Waite v. Dowley*, 94 U.S. 527, 534 (1877), the Court held that a Vermont statute, which authorized judicial enforcement of a

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[26] H.R. Rep. No. 103-651, at 53 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

[27] *Id.*

national bank's duty to furnish shareholders' names and addresses, was a "proper exercise of the rightful powers of the State."

Subsequently, this Court sustained the authority of state attorneys general to file *quo warranto* actions to enforce state laws against national banks. In *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), the national bank and the United States argued that Rev. Stat. § 5241 – the predecessor of 12 U.S.C. § 484(a) – barred Missouri's attorney general from suing the bank. *See id.* at 643 (summary of bank counsel's argument); *id.* at 645 (summary of Solicitor General's argument). The Court, however, rejected the federal government's claim of exclusive enforcement authority and upheld the Missouri attorney general's power to institute judicial proceedings to enforce the State's law. The Court declared emphatically that "the power of enforcement . . . is essentially inherent in the very conception of law." *Id.* at 660. The Court further explained that Missouri was seeking "to vindicate and enforce its own law" and was "neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers." *Id.*[28]

This case presents a situation that is indistinguishable from *St. Louis*. The New York Attorney General is seeking to enforce a valid state law that prohibits discrimination in lending and

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[28] *See also First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416, 427-28 (1917). For additional court decisions upholding the authority of state officials to sue national banks for violations of state law, *see* Pet. App. 50a-51a (Cardamone, J., dissenting).

applies to national banks. Such enforcement does *not* interfere with the charter powers of national banks or restrict bank activities that are authorized by federal law.

In a 1999 case, OCC conceded the States' authority to seek judicial enforcement of state laws against national banks. In *First Union Nat'l Bank v. Burke*, 48 F.Supp.2d 132 (D. Conn. 1999), OCC obtained an injunction to prevent Connecticut's banking commissioner from issuing administrative cease-and-desist orders against three national banks. OCC argued that "Congress intended the OCC to have exclusive administrative enforcement authority over national banks for all laws, including state banking laws." *Id.* at 135. The district court agreed with OCC but also declared that "a state may seek enforcement of its state banking laws in either federal or state court" by reason of the "vested in the courts of justice" clause in 12 U.S.C. § 484(a). *Id.* at 146.

The *Burke* court rejected the Connecticut banking commissioner's Tenth Amendment claim. However, the court emphasized that its injunction "expressly leaves available judicial remedies to compel national bank compliance with state law" and would not "preclude the [Connecticut commissioner] from seeking enforcement of this state banking statute against the plaintiff national banks through the courts." *Id.* at 149, 151. OCC "acquiesced to" the *Burke* court's 1999 determination. *See* Pet. App. 109a (decision below of the district court). It was not until 2004 that OCC amended 12 C.F.R. § 7.4000(b)(2) to bar state officials from seeking judicial enforcement of state laws against national banks. *Id.* at 109a-111a.

OCC's regulation conflicts with the "vested in the courts of justice clause" of 12 U.S.C. § 484(a) and exceeds the agency's authority under the NBA. By closing off every avenue for the States to enforce their laws against national banks, the regulation creates the same Tenth Amendment problems that the *Burke* court carefully avoided. *See Burke*, 48 F.Supp.2d at 145-46, 149. Accordingly, this Court should invalidate the regulation.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08 453

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMERICAN BANKERS ASSOCIATION AND CONSUMER BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

[Additional *amici* listed on inside cover]

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QUESTION PRESENTED

Whether a state attorney general can examine and regulate a national bank's exercise of its federally authorized banking power to engage in real-estate lending.

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BRIEF FOR AMERICAN BANKERS ASSOCIATION ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the principal trade associations for the banking industry in the United States. *Amici* and their members share respondents' interest in a nationwide regulatory environment that provides effective protection for the public without "[d]iverse and duplicative superintendence" of national banks by state officials. *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 13-14 (2007).

The American Bankers Association is the principal national trade association of the financial services industry in the United States. Its members, located in each of the fifty States and the District of Columbia, include financial institutions of all sizes and types. ABA members hold a majority of the domestic assets of the banking industry in the United States.

The Consumer Bankers Association is a nonprofit national trade association founded in 1919 to provide a collective voice for the retail banking industry. Its members comprise more than 750 federally insured financial institutions that collectively hold more than 70 percent of all consumer credit

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

held by federally insured depository institutions in the United States.

Also appearing as *amici* are 51 bankers associations. These associations represent the interests of their members at the state and local level. They provide a voice for the industry in state legislatures across the Nation, as well as providing support to their members with research and information, public relations, continuing professional education and educational materials, and business development.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the New York Attorney General's attempt to examine and regulate national banks' lending practices is preempted by the NBA.

I. Petitioner and his *amici* all but ignore the historical context from which this case arises. But that history is central to the issue petitioner has asked this Court to decide and demonstrates that the federalism balance has long been struck in favor of exclusive federal regulation of national banks.

A. As the Court has repeatedly recognized, Congress's intent in enacting the NBA was to displace all state laws that would interfere with the exercise of national banks' federally authorized banking powers.

1. The Court confirmed the supremacy of federal banking laws in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Against that backdrop, the Civil War Congress established a national banking system that was designed to be wholly independent of state authority. National Bank Act of 1864 (NBA), ch. 106, 13 Stat. 99. In so doing, the federal government prohibited States from interfering with national banks' exercise of their federally authorized banking

powers. In lieu of state regulation, the NBA created the Office of the Comptroller of the Currency (OCC), which Congress vested with exclusive authority to regulate the "business of banking" by national banks.

2. This Court has consistently reaffirmed the broad preemptive reach of the NBA. The statute is designed to protect national banks, in the exercise of their federally authorized banking powers, from the hazard of state legislation. *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874).

As the Court has explained, the "history" of the NBA "is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996). When Congress confers a power on a national bank by providing that it "may" engage in certain business, the States are powerless to prevent or place limitations on the exercise of that power by regulating the national bank's business. *Franklin Nat'l Bank* v. *New York*, 347 U.S. 373 (1954). Under the Court's settled approach to NBA preemption, all state laws that "impair [the] efficiency" of national banks' exercise of their federally authorized banking powers—*i.e.*, state laws that "interfere with," "encroach[] upon," or "hamper[]" the exercise of such powers—are preempted. *Barnett Bank*, 517 U.S. at 33-34.

The Court recently reaffirmed the NBA's broad preemptive reach in *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007), where it held that a national bank's power to engage in real-estate lending is "immune from state visitorial control." *Id.* at 13. As in *Barnett Bank* and *Franklin*, the Court emphasized

that the NBA shelters "a national bank's engagement in the 'business of banking'" from state interference. *Id.* at 21. The NBA therefore preempted the Michigan consumer-protection statute at issue because the statute hindered the efficient exercise of national banks' real-estate lending power. *Ibid.*

B. Adhering to the traditional exclusivity of federal regulation by preempting petitioner's attempt to investigate and regulate national banks' exercise of their federally authorized lending power under state law is entirely consistent with well-established principles of federalism.

Petitioner erroneously contends that this case implicates the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), which requires Congress to speak clearly when it intends to "alter the usual constitutional balance between the States and the Federal Government." *Id.* at 460 (internal quotation marks omitted). As the Court explained in *Barnett Bank*, however, federal preemption is the rule rather than the exception in the area of national banking; preemption of petitioner's attempt to examine and regulate national banks' real-estate lending powers therefore would not upset the ordinary constitutional balance. Indeed, it is petitioner who proposes to disturb the balance of authority between the States and the federal government by using *state* law to regulate *federally chartered* banks. Similarly, there is no "assumption" against preemption where, as here, Congress has legislated in an area since the dawn of the Republic. *United States* v. *Locke*, 529 U.S. 89 (2000).

The arguments advanced by petitioner's *amici* contending that preemption would offend the Tenth Amendment are equally baseless, if not frivolous.

Where States attempt to regulate in the constitutional domain of the federal government, they are subject to federal law. *E.g.*, U.S. Const. art. IV, § 2; *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824). Because Congress has the authority under the Commerce Clause to regulate national banking, it can displace state law without transgressing (or even implicating) any constitutional boundary.

II. Petitioner's attempt to examine national banks' real-estate lending records in aid of a potential state fair-lending suit—as well as that suit itself—is preempted under 12 U.S.C. § 484 because Congress has given the OCC exclusive visitorial authority over national banks.

Section 484 of the NBA explicitly provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). Congress has afforded the OCC broad visitorial authority over "all the affairs of the bank," *id.* § 481, but has not granted States "examination and enforcement authority over mortgage lending, or any other banking business done by national banks," *Watters*, 550 U.S. at 14-15. Petitioner's attempt to inspect records and data regarding national banks' real-estate loans, and to bring subsequent enforcement actions based on that investigation, falls squarely within the OCC's exclusive visitorial powers, and is therefore preempted by the NBA.

ARGUMENT

The question presented in this case is whether a state attorney general can examine and regulate a national bank's exercise of its federally authorized banking powers.

As this Court has consistently recognized, the history and structure of the National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.*, establish that state laws are preempted if they interfere with the efficient exercise of a national bank's federally authorized powers. *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 33-34 (1996) (citing cases). Petitioner and his *amici* nevertheless put forth a handful of federalism-based arguments against the continued recognition of federal supremacy in the area of national banking. *See* Pet. Br. 43-48. These arguments are difficult to take seriously: It is simply not possible to invade or offend state prerogatives by subjecting *federally chartered entities* to federal—and only federal—examination and enforcement, as more than a century of practice and precedent teaches. *See, e.g.*, *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 868 (1824).

The NBA explicitly authorizes national banks to engage in real-estate lending, 12 U.S.C. § 371, and grants the OCC exclusive visitorial authority over national banks' exercise of that power, *id.* § 484. Petitioner's attempt to examine national banks in order to determine compliance with state fair-lending laws and to enforce those state laws against national banks is therefore preempted by § 484 of the NBA because petitioner's investigatory and regulatory actions would constitute a prohibited exercise of visitorial authority over those banks.

I. THE FEDERALISM BALANCE WAS LONG SINCE STRUCK IN FAVOR OF EXCLUSIVE FEDERAL REGULATION OF NATIONAL BANKS

Whether the NBA preempts the New York Attorney General's attempt to examine and regulate national banks' real-estate lending activities cannot be determined, as petitioner suggests, solely by consulting the OCC's visitorial powers regulations. Rather, this inquiry is substantially informed by the more than 100 years of congressional enactments and judicial decisions affirming (and reaffirming) the broad preemptive reach of the NBA. That historical context answers all of the federalism concerns raised by petitioner and his *amici*. Indeed, preclusion of state efforts to examine and regulate national banks promotes—rather than interferes with—well-established principles of federalism.

A. From The Founding, Federal Law Has Reigned Supreme In The Area Of National Banking

Congress intended the NBA to displace all state laws that would interfere with the exercise of national banks' federally authorized banking powers. For that reason, States have never had a role in regulating the banking powers of these federally chartered institutions.

1. Congress Intended To Preclude State Interference With National Banks

Following ratification of the Constitution, Congress established a central bank to facilitate government borrowing by approving the charter of the First Bank of the United States (drawn up by Alexander Hamilton) in 1791. Bray Hammond, *Banks & Politics in America: From the Revolution to the Civil*

War 114-18, 197-202 (1957) (Hammond I). But both the First Bank, whose charter Congress failed to renew in 1811, and the subsequently created Second Bank of the United States, chartered in 1816, were short-lived. Alfred M. Pollard & Joseph P. Daly, *Banking Law in the United States* § 2.03, at 2-5 (2005). The States, backed by agricultural and certain mercantile interests, strongly opposed the Second Bank's power and, to counter it, imposed taxes on the Bank's operations within their jurisdictions. *Id.* at 2-6 to 2-7. It was these taxes, as levied by the State of Maryland, that led to the Court's landmark decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

In *McCulloch*, the Court emphatically confirmed the supremacy of federal over state law with respect to national banking. Starting with the fundamental principle that the powers in the Constitution are derived from the people, the Court held that the Commerce Clause (in conjunction with the Necessary and Proper Clause) of Article I authorized Congress to create a bank. 17 U.S. (4 Wheat.) at 331-33. And, laying the foundation for future federal preemption jurisprudence, the Court held that state law conflicting with federal law is superseded. *See id.* at 405 ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action"); *see also Osborn*, 22 U.S. (9 Wheat.) at 868 (federal statute incorporating the Bank of the United States preempted a state law attempting to tax the bank's operations).

Although *McCulloch* and *Osborn* clearly affirmed Congress's right to establish national banks, President Andrew Jackson vetoed the re-chartering of the

Second Bank in 1832. Hammond I at 405. That marked the beginning of a period of "free banking," in which the States liberally granted bank charters and allowed state-chartered banks to issue paper currency for use within state lines. *Id.* at 572-73. But state bank note values were uncertain and varied unpredictably, and in the late 1850s, a series of banks defaulted, setting into motion a nationwide crisis both for the currency and for commerce. *Id.* at 707-12.

The outbreak of the Civil War was the catalyst for radical change in the Nation's banking system. As the war escalated, the "country [became] involved in the expenditures of a contest for national existence." *Letter from the Sec. of the Treas. to Congress* (Apr. 11, 1862) (*reprinted in* Cong. Globe, 37th Cong., 2d Sess., Misc. Doc. No. 81, at 3 (1862)). As one Senator expressed it, "surrounded by difficulties, surrounded by war, and in the midst of great troubles, [Congress was] compelled to resort to some scheme by which to nationalize and arrange upon a secure and firm basis a national currency." Cong. Globe, 37th Cong., 3d Sess., at 844 (1863) (statement of Sen. Sherman).

The National Currency Act of 1863, ch. 58, 12 Stat. 665, revised one year later as the National Bank Act of 1864, 13 Stat. 99, was the general act that President Lincoln envisioned as necessary to shore up the Union's faltering currency. According to President Lincoln, there was "no other mode by which 'the great advantages of a safe and uniform currency' could be achieved so promisingly and unobjectionably as by the organization of banking associations under a general act of Congress." Bray Hammond, *Sovereignty and an Empty Purse: Banks and Politics in the Civil War* 290 (1970); *see also id.*

at 314 (discussing the NBA's key objective "to rationalize the decentralized, unstable structure of state banks and to create a uniform banknote currency" under federal control).

In debating the legislation, both proponents and opponents of the NBA recognized that it granted the federal government the *exclusive* power to control the national banking system. The NBA would establish a banking system "made to operate directly upon the people independent[] of State boundaries or State sovereignty," and "wholly independent of State authority." Cong. Globe, 37th Cong., 3d Sess. 1115 (1863) (statement of Rep. Spaulding). As one opponent stated, "the whole purpose and object and scope and tendency of the bill is to prostrate State power and put it at the control of the great centralized power to be established here." Cong. Globe, 38th Cong., 1st Sess. 1413 (1864) (statement of Rep. Mallory). In defense of that purpose, a supporter of the NBA stated:

> The proposition, as I understand it, is to make this a great national system, to make it responsible to the national Government, to make it subject to any burdens and restrictions the national Government may see fit to place upon it; and to carry out that object it will not do to place it in the power of the States, otherwise you place it in the power of any State which may be opposed to the system to cripple and destroy it.

Id. at 1393 (statement of Rep. Washburn).

Congress was keenly aware of *McCulloch* v. *Maryland* when it drafted the NBA to preclude States from overseeing national banks' exercise of their federally authorized banking powers. As one

Senator reminded his colleagues, the Court had explained that "'it is of the very essence of supremacy to remove all obstacles to its action within its own sphere,'" and, accordingly, a bank created by the federal government "must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions." Cong. Globe, 38th Cong., 1st Sess. 1893 (1864) (statement of Sen. Sumner) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 427). Thus, he continued, "I shall vote to keep [the new national banking system] free from all State hostility or even State rivalry, that it may become in reality as in name, national in all respects." *Id.* at 2130.

Ultimately, Congress embraced the NBA's objectives, and voted "to take from the States . . . all authority whatsoever over . . . [national] banks, and to vest that authority here in Washington, in the . . . Secretary of the Treasury." Cong. Globe, 38th Cong., 1st Sess. 1267 (1864) (statement of Rep. Brooks). The NBA codified federal control over the money supply, taxation, and interest rate regulation, and prohibited the States from exerting their interests in those areas. National Bank Act, ch. 106, §§ 19-23, 30 (interest rates), 31 (currency), 41 (taxation), 13 Stat. at 105-06, 108-09, 111-12; *see also* Cong. Globe, 38th Cong., 1st Sess. 1376 (interest rate regulation), 1377 (control of national currency) (1864). The federal government thereby "assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." *Letter from the Sec. of the Treas. to the Senate* (Apr. 12, 1866) (*reprinted in* Cong. Globe, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (1866)).

Within the Department of the Treasury, the NBA created the Office of the Comptroller of the Currency (OCC), in which Congress vested plenary authority to charter, examine, supervise, regulate, and bring enforcement actions against national banks. That authority was exclusive of any state "visitorial" power over national banks. 13 Stat. at 116 (codified as amended at 12 U.S.C. § 484).[2]

Congress confirmed the exclusive nature of the OCC's visitorial authority over national banks in 1982. Responding to a state court decision concerning the enforcement of state escheat laws, *see Minnesota* v. *First Nat'l Bank of St. Paul*, 313 N.W.2d 390 (Minn. 1981), Congress amended the NBA both to correct that court's erroneous conclusion that state law could serve as authority for state examinations of national banks, *see* Act of Jan. 12, 1983, Pub. L. No. 97-457, § 23(a), 96 Stat. 2507, 2510 (replacing 12 U.S.C. § 484's reference to permissible non-OCC visitations "authorized by law" with "authorized by Federal law"), and carved out an extremely narrow exception to the OCC's exclusive visitorial authority for certain state examinations of national banks based on evidence of noncompliance with state escheat laws. *See* 12 U.S.C. § 484(b); Pub. L. No. 97-457, § 23(a), 96 Stat. at 2510. Such an exception would have been unnecessary had the statute not otherwise

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[2] In its original version, the "visitorial powers" provision of the NBA stated: "[A national bank] shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the general courts of law and chancery." The reference to "this act" was subsequently codified as "this Title," 1875 Rev. Stat. 5421, and later was changed to "law." *See* Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251, 272 (Dec. 23, 1913) (also replacing the reference to "courts of law and chancery" with "courts of justice").

so completely prohibited the States from exerting visitorial authority over national banks.

Although the original enactment of the NBA vested national banks with a number of broad banking powers, real-estate lending was not one of them. *See Nat'l Bank* v. *Matthews*, 98 U.S. 621, 626 (1878). Once Congress determined to give national banks that power, however, it did so in a manner that ensured that national banks' real-estate lending would be subject exclusively to *federal* control and regulation. Beginning in 1913, Congress expressly authorized national banks to make loans secured by farmland under restricted conditions. Federal Reserve Act of 1913, Pub. L. No. 63-43, § 24, 38 Stat. 251, 273. Three years later, Congress expanded that power by authorizing loans on farmland within specified geographic areas, and by authorizing loans on other types of property subject to other restrictions. Act of Sept. 7, 1916, ch. 461, § 24, 39 Stat. 752, 754-55 (codified as amended at 12 U.S.C. § 371).

In the years that followed, Congress continued to amend § 371 of the NBA to progressively remove the statutory limitations on national banks' power to engage in real-estate lending. In 1982, it removed those statutory restrictions altogether, replacing them with a broad provision that authorized national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation." Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403, 96 Stat. 1469, 1510-11. Most recently, in 1991, Congress again amended § 371, adding an additional requirement that national banks comply with the uniform real-estate

lending standards adopted by federal banking regulators, including the OCC, pursuant to 12 U.S.C. § 1828(*o*). *See* 12 U.S.C. § 371(a).

Thus, "the history of national banks' real estate lending activities under section 371 is one of extensive Congressional involvement gradually giving way to a streamlined approach in which Congress has delegated broad rulemaking authority to the Comptroller." Bank Activities and Operations; Real Estate Lending and Appraisals, 68 Fed. Reg. 46,119, 46,124 (Aug. 5, 2003). But, whether that regulatory authority is exercised by Congress or the OCC, "national bank real estate lending authority," since its inception, "has been extensively regulated at the *Federal* level" and immune from state oversight. *Ibid.* (emphasis in original).

2. This Court Has Interpreted The NBA To Preempt State Laws That Interfere With National Banks

Since its enactment, the NBA's broad displacement of state efforts to examine and regulate national banks has been firmly established and frequently reaffirmed by this Court.

In one of its earliest interpretations of the NBA, the Court described the statute as specifically designed to protect national banks' exercise of federally authorized powers from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874). Thus, insofar as the banking powers of national banks are concerned, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechs.' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875).

Consistent with its opinion in *McCulloch* v. *Maryland*, the Court subsequently explained:

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that *an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void*, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either *frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created.*

Davis v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) (emphases added); *see also Talbott* v. *Bd. of County Comm'rs*, 139 U.S. 438, 443 (1891) ("The[] various provisions, scattered through the entire body of the statute respecting national banks, emphasize . . . an intent to create a national banking system coextensive with the territorial limits of the United States, and with uniform operation within those limits"); *Easton* v. *Iowa*, 188 U.S. 220, 231 (1903) (the NBA "provide[s] a symmetrical and complete scheme for the banks to be organized under the provisions of the statute").

Echoing Congress's own statements regarding the uniform nature of the system prescribed by the NBA, the Court has emphasized that national banks must remain "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the

states." *Easton*, 188 U.S. at 229. And, because a "State has no power to enact legislation contravening the Federal laws for the control of national banks," *Guthrie* v. *Harkness*, 199 U.S. 148, 152 (1905), "[h]owever wise or needful [a State's] policy, . . . it must give way to [any] contrary federal policy" underlying the NBA. *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 378-79 (1954); *see also Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 314-15 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system'") (citation omitted).

Central to the Court's NBA preemption jurisprudence is the settled principle that the States may not interfere with the efficient exercise of the banking *powers* of national banks. As the Court has explained:

> In using the word "powers," the [NBA] chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "*powers*" to national banks as grants of authority not normally limited by, but rather *ordinarily pre-empting*, contrary state law.

Barnett Bank, 517 U.S. at 32 (emphases added); *see also id.* at 33 ("In defining the pre-emptive scope of statutes and regulations granting a power to national banks," the Court in prior cases had recognized that "normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted").

In *Barnett Bank*, the Court held that the NBA preempted a Florida statute that prohibited banks from selling insurance because the state law "impair[ed]" national banks' statutory power under the NBA to sell insurance in towns with populations of less than 5,000. 517 U.S. at 33. In reaching that conclusion, the Court relied particularly on its 1954 decision in *Franklin*, which emphatically underscores the breadth of a national bank's authority to exercise its banking powers free from *any* state limitation or condition.

Franklin held that the NBA preempted a New York State statute that forbade banks to use the words "saving" and "savings" in advertising. 347 U.S. at 374. The New York statute did not prohibit banks from taking deposits—*i.e.*, exercising savings-related banking powers—but rather *conditioned the exercise of those powers* on a limitation on the right to advertise regarding bank deposit accounts. The Court recognized that the New York statute prevented only the *specific* power to use the word "savings" in advertising, but nevertheless held that preemption derived from the effect of the state restriction upon the *underlying* national bank power to offer savings accounts. Observing that "[m]odern competition for business finds advertising one of the most usual and useful of weapons," the Court found that "[i]t would require some affirmative indication to justify an interpretation that would permit a national bank to engage in a business but gave no right to let the public know about it." *Id.* at 377-78. As there was "no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances," the advertising restriction was preempted—not because it "prevented" a certain

form of marketing activity, but rather because it *burdened the exercise of the power* to offer savings accounts. *Id.* at 378.

The history and structure of the NBA thus teach that the federal statute displaces all state laws that "impair [the] efficiency" of national banks' *exercise of their federally authorized powers*, both express and incidental. *Barnett Bank*, 517 U.S. at 34 (internal quotation marks omitted). Accordingly, if a state law would "interfere with," "encroach[]" upon, or "hamper[]" the exercise of a power authorized under the NBA, it is preempted. *Id.* at 33-34. In contrast, the NBA does not preempt state laws that do not unduly burden a national bank's "exercise of its powers." *Ibid.* (offering examples of non-preempted laws).[3]

The NBA's broad prohibition on state efforts to examine and regulate national banks was explicitly reaffirmed in *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1 (2007). There, the Court held that a national bank's real-estate lending business—whether conducted by the bank itself or one of its operating subsidiaries—is "immune from state visitorial control" and that the NBA therefore preempted a Michigan consumer-protection statute that purported to subject the lending activities of a national bank operating subsidiary to state oversight. *Id.* at 13 (citing 12 U.S.C. § 484(a)). As in *Barnett* and *Franklin*, the Court reiterated that "the NBA . . . protect[s] from state hindrance a national bank's engagement in the 'business of banking.'" *Id.* at 21. "[W]hen state pre-

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[3] *See also* 12 C.F.R. § 34.4(b) ("State laws on [certain enumerated] subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers").

scriptions significantly impair the exercise of [a national bank's] authority," the Court explained, "the State's regulations must give way." *Id.* at 12. Because 12 U.S.C. § 371 explicitly authorizes national banks to engage in real-estate lending, state law may not "significantly burden[,] . . . curtail or hinder a national bank's efficient exercise" of that power. *Id.* at 13. To hold otherwise, the Court recognized, would subject national banks to "[d]iverse and duplicative superintendence of . . . the business of banking," which is precisely what Congress intended the NBA to prevent. *Id.* at 13-14. Thus, States cannot exercise "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15.[4]

B. Adherence To The Tradition Of Exclusive Federal Oversight Of National Banks Raises No Federalism Concerns

In a series of interrelated arguments, petitioner and his *amici* contend that principles of federalism should lead the Court to conclude that the NBA does not preempt state examination and enforcement under state fair-lending laws, even if such state oversight would interfere with the efficient exercise of national banks' lending operations. The Court re-

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[4] Significantly, the Court reached this conclusion without finding it necessary to consult an OCC regulation precluding state oversight of national bank operating subsidiaries because it found the NBA to be clear on its face: It precludes state "hindrance" or "impair[ment]" of a national bank's "business of banking"—including the business of real-estate lending—whether conducted by the national bank itself or by its operating subsidiary. *Watters*, 550 U.S. at 12, 21; *see also* 12 U.S.C. §§ 24(Seventh), 24a(g)(3)(A), 371, 484.

jected a variant of this argument almost 200 years ago in *McCulloch* v. *Maryland*; as reformulated here, it fares no better today.

Petitioner first argues that Congress can only preempt his oversight of national banks' federally authorized lending power if Congress satisfies the "clear statement" rule of *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991). Pet. Br. 43-45. That rule requires Congress to speak clearly when it intends to "alter the usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985) (internal quotation marks omitted)). But congressional displacement of petitioner's attempt to examine and regulate national banks' real-estate lending would not upset the usual balance between state and federal power; to the contrary, it would be consistent with the exclusive federal regulation of national bank powers since the Civil War. *See, e.g.*, *Easton*, 188 U.S. at 230 ("Such being the nature of [national banks], it must be obvious that their operations cannot be limited or controlled by state legislation").

Indeed, the national banking system is an area of traditional federal authority that would, if anything, require a clear statement to permit *state* action because it is petitioner who seeks to alter the traditional federal-state balance. Petitioner's invocation of the "clear statement" rule is therefore manifestly inapposite. In any event, the Court has held for more than a century that the federal banking laws clearly preclude state efforts to examine and regulate the exercise of banking powers by national banks. *Watters*, 550 U.S. at 15-16; *Davis*, 161 U.S. at 290. No more is required.

Petitioner similarly argues that the preemption analysis should "begin[] with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pet. Br. 46 (quoting *Altria Group, Inc.* v. *Good*, 555 U.S. __, 127 S. Ct. 538, 543 (2008) (internal quotation marks omitted)). But as the Court has made clear, "an 'assumption' of nonpre-emption is *not* triggered when the State regulates in an area where there has been a history of significant federal presence." *United States* v. *Locke*, 529 U.S. 89, 108 (2000) (emphasis added). The regulation of national banks is indisputably such an area.

Indeed, state police powers have *never* extended to the regulation of the banking powers that Congress explicitly conferred on national banks, and this Court has consistently rejected States' attempts to extend those powers. *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 436 (state taxing authority); *Barnett Bank*, 517 U.S. at 33 (state authority to regulate insurance). Where "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme," "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108. As discussed above, Congress chartered the First Bank of the United States just three years after ratification of the Constitution, and an extensive federal statutory and regulatory framework has governed the national bank system since the Civil War. Neither petitioner nor any of his *amici* has been able to cite even a single decision in which this Court has applied the "assumption of nonpre-emption" to a preemption inquiry under the NBA. Preemption is the rule, not

the exception, in such cases. *Barnett Bank*, 517 U.S. at 32.

Petitioner's reliance on *Printz* v. *United States*, 521 U.S. 898 (1997), and *New York* v. *United States*, 505 U.S. 144 (1992), is similarly misplaced. Pet. Br. 43-44. Although principles of political accountability may prevent Congress from "commandeering" state officers to enforce a federal law, the lines of political accountability remain clear where States are barred from enforcing their own lending regulations against federally chartered entities that have been governed by comprehensive federal regulatory requirements throughout their entire history. Moreover, it is not unusual for the federal government to bear exclusive responsibility for enforcing state law where federal interests are at stake. *See, e.g.*, 18 U.S.C. § 13 (laws of the States made applicable to federal properties and jurisdictions). It is petitioner's attempt to change the *status quo* in this respect that would blur lines of political accountability and unsettle the well-established principle that the federal government is supreme within its own sphere of operations.

Petitioner seeks to avoid these conclusions by arguing that "this case is not about banking regulation, an area where there has been a sustained federal presence as to national banks." Pet. Br. 46-47. But banking regulation is *exactly* what this case is about—specifically, who has the authority to examine and regulate the terms and conditions of national banks' real-estate loans. Congress has given the power to engage in real-estate lending to federally chartered banks, 12 U.S.C. § 371, subject to the OCC's exclusive visitorial authority, *id.* § 484, and States cannot interfere with the efficient exercise of that power. *Barnett Bank*, 517 U.S. at 33. Petitioner's arguments are therefore more appropriately

directed to Congress, which alone may authorize state regulation of federal entities. *Cf.* 12 U.S.C. § 484(b) (expressly authorizing limited state regulation). But unless and until Congress does so, petitioner's request that this Court alter the federal-state balance should be declined.

Petitioner's *amici* go even further by arguing that prohibiting state oversight of national banks would exceed the powers conferred on Congress by the Constitution, and thus offend the Tenth Amendment's reservation of power to the States. Indeed, the briefs submitted by the States and the American Association of Residential Mortgage Regulators, as *amici* for petitioner, suggest that this case is a "mirror image" of *Printz* and *New York*. States Br. 6; AARMR Br. 24. But far from being "mirror images" of this case, those precedents are false parallels.

The Court's concern in *Printz* and *New York* was with state officials being "dragooned into administering federal law." *Printz*, 521 U.S. at 928 (internal quotation marks omitted). Here, Congress's prohibition against state interference with a federal entity's exercise of its federal powers in no way commandeers state officials to enforce a federal regulatory scheme. Indeed, the fact that the federal government cannot require the States to enforce federal gun laws (*Printz*) does not prevent Congress from enjoining the States from enforcing state gun laws against federal officials. In the same way, even if Congress cannot require States to enforce federal law against national banks, it certainly can prevent the States from enforcing state laws against national banks' exercise of their federally authorized banking powers. *See McCulloch*, 17 U.S. (4 Wheat.) at 436.

Moreover, in *Printz* and *New York*, the Court found that "an essential attribute of the States' retained sovereignty [is] that they remain independent and autonomous *within their proper sphere of authority*." *Printz*, 521 U.S. at 928 (emphasis added); *see also New York*, 505 U.S. at 180. But outside their proper sphere of authority—for example, where they try to intrude into the *federal* sphere—States do not remain independent and autonomous, but rather are subject to sovereign federal law. This principle is firmly established in this Court's precedent, *e.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 868, and in the Supremacy Clause of the Constitution, U.S. Const. art. VI, § 2.

It is not surprising, then, that the Tenth Amendment argument urged by petitioner's *amici* was squarely rejected in *Watters* by both the majority and the dissent. 550 U.S. at 22; *id.* at 43-44 (Stevens, J., dissenting). The Court explained that "'[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.'" *Id.* at 22 (quoting *New York*, 505 U.S. at 156). Thus, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States" without violating the Tenth Amendment. *Gregory*, 501 U.S. at 460. It is well-settled that Congress acts within its constitutional powers when creating national banks, *see, e.g.*, *Farmers & Mechs.' Nat'l Bank*, 91 U.S. at 33, and that "[r]egulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses," *Watters*, 550 U.S. at 22.

Because petitioner's examination and regulation of national banks' real-estate lending practices would impair the exercise of banking powers that Congress

plainly had the authority to confer on national banks, preemption transgresses no constitutional boundary.

II. THE NBA PREEMPTS PETITIONER'S ATTEMPT TO EXAMINE AND REGULATE NATIONAL BANKS' EXERCISE OF THEIR REAL-ESTATE LENDING POWER

Petitioner attempts to escape the NBA's preemptive force by focusing principally on an OCC regulation that provides, in part, that "[o]nly the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks." 12 C.F.R. § 7.4000. Petitioner and his *amici* argue at length that this regulation does not merit judicial "deference." Pet. Br. 42-57. But there is no need for the Court even to reach that issue because preemption of petitioner's attempt to interfere with national banks' federally authorized lending power flows from the NBA itself, and does not depend on the degree of deference due Section 7.4000.

In petitioner's own words, he "seeks the ability to bring lawsuits in state court to enforce New York's fair lending laws, and to conduct targeted investigations in contemplation of such lawsuits." Pet. Br. 26. Both the lawsuits threatened by petitioner and his demand for lending information in aid of those suits are preempted by the NBA because Congress has afforded the OCC exclusive visitorial authority over national banks. 12 U.S.C. § 484. The injunction against petitioner's examination and regulation of national banks' lending power should therefore be sustained in its entirety, irrespective of the meaning or validity of the regulation that is the focus of petitioner's and his *amici*'s submissions.

Section 484 of the NBA provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a). Congress intended that the OCC's visitorial authority over national banks extend to "all the affairs of the bank." *Id.* § 481. Using these broad visitorial powers, the OCC can "correct all abuses of authority, and . . . nullify all irregular proceedings" by national banks. *Guthrie*, 199 U.S. at 158 (internal quotation marks omitted). Congress did not afford States similar visitorial authority over national banks, and state officials are therefore barred by § 484 from examining and regulating national banks' exercise of their federally authorized banking powers.

Real-estate lending is no exception to this rule. Like all other federally authorized banking powers, "lending, when conducted by a national bank, is immune from state visitorial control" because "[t]he NBA specifically vests exclusive authority to examine and inspect in OCC." *Watters*, 550 U.S. at 13. This assignment of exclusive visitorial authority to the OCC reflects the judgment of Congress—and this Court—that "[s]tate laws that . . . subjected [national banks'] lending to [a] State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business." *Ibid.*

Petitioner's attempt to examine and regulate national banks' real-estate lending practices falls squarely within the scope of the OCC's exclusive visitorial powers. In anticipation of potential fair-lending suits, petitioner sought to inspect bank records and data regarding loans that national banks made on New York property over a one-year period. Pet. App. 49a. Petitioner requested a wide range of information regarding those loans, including all vari-

ables and formulas that the national banks used to determine the annual percentage rate on their loans, the circumstances in which the banks deviated from their standard rate formula, and extracts from every computer database containing the banks' basic loan conditions. Pet. App. 50a. Such "examination and enforcement authority over mortgage lending" by national banks rests within the sole province of the OCC. *Watters*, 550 U.S. at 14-15.

State investigations and enforcement actions regarding the exercise of national banks' lending powers could result in burdensome oversight of national banks' day-to-day lending practices. Indeed, the New York Attorney General recently settled a fair-lending investigation into the activities of a lending institution through an agreement that mandated extensive and continuous state supervision of the institution's lending practices. *See* Assurance of Discontinuance Pursuant to Executive Law 63(15) (Nov. 22, 2006), *available at* http://www.oag.state.ny.us/media_center/2006/dec/Countrywide%20Assurance%20Final%20Signed%20PDF.pdf (requiring the lender to adopt new real-estate lending policies, retain a state-approved independent consultant to review and approve certain lending procedures, and provide periodic reports to the State regarding its real-estate lending practices). If the NBA were construed to permit similar state examination and regulation of national banks' lending practices, state attorneys general could undertake equally intrusive oversight of national banks' day-to-day lending activities and "impose limitations and restrictions as various and as numerous as the States." *Easton*, 188 U.S. at 229. But such "[d]iverse and duplicative superintendence of . . . the business of banking . . . is precisely what the NBA was designed to prevent." *Watters*, 550

U.S. at 13-14; *see also* Cong. Globe, 38th Congress, 1st Sess. 1873 (1864) (statement of Sen. Sumner) (national banks should be "substantially the same in Washington, in New York, in Boston, and in Chicago," such that the "complications and differences" of the various state laws would not interfere with the exercise of their powers).

Petitioner seeks to avoid preemption by arguing that the OCC's visitorial powers are limited to inquiries into conformance with federal charter requirements and that his investigation into compliance with fair-lending laws therefore falls outside of § 484. Pet. Br. 26. But the fact that a state examination of a national bank's records serves a consumer-protection purpose does not remove that examination from the scope of the OCC's exclusive visitorial powers. Indeed, the state statute in *Watters* was "[e]nacted to protect consumers from mortgage lending abuses," 550 U.S. at 34 & n.18 (Stevens, J., dissenting); *see also id.* at 13-14 (majority opinion), but the Court nevertheless held that it was preempted by § 484 because the "authority to engage in the business of mortgage lending comes from the NBA," which "vests visitorial oversight" of national banks "in OCC, not state regulators," *id.* at 21.

States therefore cannot "interfere, whether with hostile or friendly intentions, with national banks . . . in the exercise of the powers bestowed upon them by the general government." *Easton*, 188 U.S. at 238. That well-settled principle is an insurmountable obstacle to petitioner's attempt to examine and regulate national banks' federally authorized lending power under state law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,
Petitioner.

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY, *Respondents.*

On Writ of Certiorari To The
United States Court of Appeals For the Second Circuit

BRIEF *AMICI CURIAE* OF CENTER FOR RESPONSIBLE LENDING, AARP, NATIONAL CONSUMER LAW CENTER, U.S. PUBLIC INTEREST RESEARCH GROUP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, SOUTH BROOKLYN LEGAL SERVICES, CONSUMERS UNION, PUBLIC CITIZEN, NEW YORK CITY'S DEPARTMENT OF CONSUMER AFFAIRS AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici on this brief are organizations and governmental bodies with a commitment to consumer protection who have an interest in seeing strong and effective enforcement of consumer protection laws. We have seen the primary role that states have played in enacting and enforcing laws to protect consumers from financial institutions' abusive practices, and believe that consumers, communities and the economy would be ill-served by concentrating in one federal agency the authority to enforce non-preempted state consumer protection laws as to some of the nation's largest banks and their operating subsidiaries.

SUMMARY OF ARGUMENT

Federal banking law leaves a significant role for state laws over the day-to-day operations of national banks. But for those non-preempted laws to have any effect, they must be enforced. Under ordinary principles of sovereignty, it would be up to state officials to ensure that their own non-preempted laws are enforced. Yet the Office of the Comptroller of the Currency ("OCC"), through its

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[1] The parties have consented to the filing of this brief. Letters of consent from Attorney General Cuomo and The Clearing House Association have been filed with the Clerk of the Court. A letter of consent from the United States Solicitor General accompanies this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to its preparation or submission.

promulgation of 12 C.F.R. § 7.4000, sought to forbid state officials from enforcing their own laws. Instead, it arrogated unto itself the right to be the sole entity to decide when, how, or even if non-preempted state laws will be enforced.

OCC exceeded its authority in promulgating this rule, and for that reason alone the decision below must be reversed. Attorney General Cuomo cogently explains why the regulation's disabling of state enforcement is inconsistent with this Court's previous interpretations of the National Bank Act, substantially disturbs the state-federal balance, and concerns a question of legal interpretation in which courts rather than administrative agencies are experts. Even if the National Bank Act could be interpreted in the way adopted by OCC, upholding the visitorial powers regulation requires evidence that OCC has the will, the experience, the expertise, and the capacity to replace that which it seeks to displace. That evidence is missing.

While state officials have a long and impressive record of protecting their citizens from abusive financial practices—a power the regulation broadly strips away—there is little evidence that OCC can or will enforce those state laws effectively and vigorously. In this brief, we compare the enforcement records of the states, *see infra* Section I, and OCC, *see infra* Section III. We also discuss the troubling implications for enforcement likely to result from the agency's expansive interpretation of "banking" activities and from the extension of the protective cloak of preemption to third-party agents. *See infra* Section II. We conclude that enforcement

of non-preempted state laws would not be left in good hands if OCC's expansive self-asserted authority is upheld.

ARGUMENT

I. THE VISITORIAL POWERS REGULATION IGNORES STATE OFFICALS' CRITICAL ROLE IN ENSURING FINANCIAL PRACTICES COMPLY WITH CONSUMER PROTECTION LAWS.

At its core, the dispute over this regulation is the challenge it presents to the fundamental understanding of our federal system. This Court has recognized, in interpreting the National Bank Act, that a state's power to sue to enforce its law is "inherent in the very conception of law." *First Nat'l Bank in St. Louis v. Missouri,* 263 U.S. 640, 660 (1924). To separate the law from its enforcement is to cede the right to make it meaningless, or at least to make it mean less. For that reason, when the state law applies to a national bank, it is the right of the state to enforce it. *Cf. Jackson v. First Nat'l Bank of Valdosta,* 349 F.2d 71, 75 (5th Cir. 1965).[2]

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[2] The Bank of Valdosta had breached the limits of the applicable state standards on branching, apparently with the sanction of the Comptroller of the Currency. The court noted that the state was well-suited to enforce the law's limits on a bank which, "even with the approval of the Comptroller of the Currency, would naturally be inclined to push the restrictions of [the authorized activity] to, or, if possible, beyond their proper limits." 349 F.2d at 75 (footnote omitted).

In promulgating the visitation regulation, OCC far exceeded its authority to disturb this fundamental balance, which alone warrants reversal of law. But on a more ordinary level, this regulation violates even basic principles of administrative law.

An administrative agency in adopting regulations "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assoc. of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Yet, as the Second Circuit opinion acknowledged:

> [T]he OCC does not appear to have found any facts at all in promulgating its visitorial powers regulation. It accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth. Indeed, there is very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*.

Pet. App. 25a-26a. Part of the record on which OCC should have based the decision was the objective facts about where the responsibility for and record of enforcement of consumer protection laws in this country has lain for decades.

State officials have a long track record of providing invaluable enforcement of consumer protection laws, including enforcement relating to financial practices. Even prior to the enactment of the visitation rule, the attorneys general of all fifty states submitted comments to OCC in 2003 that catalogued a wide range of unfair practices by financial institutions, ranging from unfair solicitations to racial targeting, that their offices had recently investigated. *See* Comment Letter from National Association of Attorneys General to OCC, Docket No. 03-16 (Oct. 6, 2003), *reprinted in Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 108-09 (2004). The record of state action in fact demonstrates two decades of enforcement of state consumer protection laws *against national banks*, without question or challenge as to their authority until the agency's recent expansive interpretation of the regulation.[3]

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[3] State laws prohibiting unfair or deceptive acts or practices, a primary tool used by state attorneys general for consumer protection, were primarily adopted during the 1970s. Reported cases indicate enforcement of state consumer protection laws against a national bank as early as 1981. For example, the state of Alaska sued a national bank in connection with its role as a financer of a real estate development—an authorized banking activity. *Alaska v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982). Similarly, Michigan sued a national bank over its mortgage escrow practices—though mortgage lending is also an expressly authorized banking activity. *Attorney Gen. v. Mich. Nat'l Bank*, 312 N.W.2d 405, 414 (Mich. Ct. App. 1981), *rev'd in part and remanded on other grounds*, 325 N.W.2d 777 (Mich. 1982); *see also Arizona v. Sgrillo*, 859

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Often, the banks involved in these cases were providing the means to finance a fraudulent or deceptive sale. As the West Virginia Supreme Court has noted, banks are a necessary party to assure adequate remedies for the victims:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under [a state consumer protection law] did not include lawsuits against financial institutions such as the defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumer protection would be stripped of its efficacy.

Scott Runyan Pontiac-Buick, 461 S.E.2d at 526.

In addition to losing the states' experience in enforcing such matters, depriving the states of the right to enforce their non-preempted consumer

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P.2d 771 (Ariz. Ct. App. 1993) (listing Valley National Bank as a defendant in case involving sale of information about credit cards); *Wisconsin v. Ameritech Corp.*, 517 N.W.2d 705 (Wis. Ct. App. 1994), *aff'd*, 532 N.W.2d 449 (Wis. 1995) (naming Household Bank, N.A. as a defendant in a case involving advertising and marketing); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995) (allowing a state attorney general's claims against Citizens National Bank for assignee liability as financer of dealer's car loans to go forward).

protection laws raises serious concerns of capacity. According to a recent congressional report, state banking agencies and state attorneys general offices employ nearly 700 full time staff to monitor compliance with consumer laws, more than seventeen times the number of OCC personnel allocated to investigate consumer complaints. H. Comm. on Financial Services, 108th Cong., Views and Estimates on Matters To Be Set Forth in the Concurrent Resolution on the Budget for Fiscal Year 2005, at 16 (Comm. Print 2004). "In the area of abusive mortgage lending practices alone, State bank supervisory agencies initiated 20,332 investigations in 2003 in response to consumer complaints, which resulted in 4,035 enforcement actions." *Id.*

The current economic troubles make abundantly clear that, in the absence of experienced and capable consumer protection law enforcement, the mortgage industry will fail to abide by even the most common sense rules of its own business. Though, as it turns out, it was but a thumb in the dike, nevertheless, state officials were on the front lines of investigating and conducting enforcement against the deception and unfairness that permeated the origination of risky mortgage loans very early, and remained so, providing those state officials with considerable experience and expertise.[4]

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[4] In the midst of the subprime boom, OCC officials dismissed state efforts to enforce consumer protection laws related to lending as unnecessarily adding "cost burdens" on national banks by "requir[ing] a bank to increase compliance staff, provide additional training to both existing and new staff, and

(Continued)

Further, state officials took strong action against the market leaders, not merely small players in the market. As early as 1998, several states joined forces against First Alliance Mortgage Company. *See* Diana B. Henriques, *Mortgaged Lives: Profiting from Fine Print with Wall Street's Help*, N.Y. Times, Mar. 15, 2000, at A1. In 2002, they obtained a record $484 million settlement against Household, one of the top two or three largest originators of subprime mortgages from 1998 to 2002. *See Household To Pay Record Fine and Change Lending Practices*, N.Y. Times, Oct. 12, 2002, at C4. This was followed by an investigation into the subsequent subprime market leader Ameriquest, which also resulted in a large settlement to compensate victimized consumers. *See Ameriquest To Pay $325 Million in a Settlement over Lending*, N.Y. Times, Jan. 21, 2006, at C13. Most recently, states obtained for consumers a multi-billion dollar settlement from Countrywide. *See* Gretchen Morgenson, *Countrywide To Set Aside $8.4 Billion in Loan Aid*, Oct. 5, 2008, at B1.

Not only have state officials successfully obtained settlements for consumers victimized by

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pay fees to obtain third-party sampling and certification [on loan quality]." *Congressional Review of OCC Preemption*, *supra*, at 207 (written statement of Julie L. Williams, Chief Counsel, OCC). But had national banks expended such modest amounts at that time to ensure that the loans they made or purchased had been evaluated for the ability of borrowers to repay, they would have been less likely today to face the massive losses that resulted from reckless real estate lending that pervaded the market. *See infra* Section III.D.

abusive mortgage practices, but they have also obtained judicial determinations that certain lending practices violated consumer protections law. The Massachusetts Attorney General has been particularly active on this front, suing lenders for having engaged in an illegal unfair or deceptive trade practice or act by making subprime loans that, through a combination of features commonly included by lenders during the boom years, ensured that borrowers would not be able to afford the loans over the long-term. The Attorney General's position recently received unanimous vindication by the Massachusetts Supreme Judicial Court. *See Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 733 (Mass. 2008). The Massachusetts Attorney General's action promises that, as long as state officials continue to have a role policing financial practices, such unfair lending practices will not return to that state and cause a future generation of its residents to face a wave of foreclosure.

Crucially, the states' enforcement efforts include not only monetary relief, but injunctive relief that is public and transparent. Citizens know what their states expect of companies offering financial services, which helps avoid relapses.[5] Shareholders can see what rules will govern the operations of the business. Injunctive relief that is clear and transparent helps establish boundaries, which deters

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[5] It also makes state officials accountable for how they have chosen to enforce state consumer protection laws. This result reinforces Attorney General Cuomo's discussion of the political accountability consequences of OCC's regulation disabling state enforcement efforts. *See* Pet. Br. 43-46.

other businesses from violating the law. On the other hand, secrecy, not transparency, is more characteristic of OCC's enforcement. *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Financial Services*, 110th Cong. 131-32 (2007) (written statement of John C. Dugan, Comptroller of the Currency) (explaining OCC primarily ensures consumer protection through "behind the scenes" supervision).

Even those who have served as federal regulators recognize the important role played by state officials in enforcing consumer protection laws in the financial field. Former Federal Reserve Chairman Alan Greenspan recently commented that the response to criminal or illegal acts related to mortgage lending "should be with the states' attorney general and, frankly, it should be beefed up a considerable amount from where it is at this stage." Jane Wardell, *Greenspan Defends Subprime Market*, St. Louis Post-Dispatch, Oct. 3, 2007, at D1 (internal quotation marks omitted).

In sum, there is significant evidence that enforcement by state regulators has served an important role in protecting consumers against abusive financial practices. To the extent that the visitorial powers regulation was destined to prevent these regulators from acting, OCC's failure to consider that fact renders the regulation invalid.

II. THE RULE WILL HAVE UNINTENDED CONSEQUENCES OF IMPEDING ENFORCEMENT INVOLVING ACTIVITIES AND ACTORS OUTSIDE OCC'S EXPERTISE.

The failure of OCC to consider the record of state officials enforcing consumer protection laws concerning financial practices is all the more erroneous when the true scope of OCC's regulation is considered. The language of the visitorial powers regulation may seem innocuous enough, purporting to prevent state officials from "[e]nforcing compliance with any applicable federal or state law concerning those activities . . . authorized or permitted pursuant to federal banking law." 12 C.F.R. § 7.4000(a)(2)(iii), (iv). But the power that the agency has sought to concentrate in itself over the past few years through this simple language is a much greater departure than appears at first blush. There is a compounding effect resulting from OCC's expansive reading of different parts of that regulation. It has expanded the concept of what constitutes "visitation," and diminished the "courts of justice" exception provided by Congress in 12 U.S.C. § 484. *See* Pet. Br. 10-11 (detailing the effects of the 1999 and 2004 amendments to the regulation).[6] It has also created an ever-increasing

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[6] The same day OCC issued the visitorial powers regulation, *see* 69 Fed. Reg. 1904 (Jan. 13, 2004), it also narrowed the universe of non-preempted state laws with its new preemption rules, *see* 12 C.F.R. §§ 7.4007(b), (c) (deposits), 7.4008(d), (e) (non-real estate lending), 7.4009(c) (incidental powers), 34.4 (real estate lending).

list of "authorized or permitted" activities—many of which are incidental to banking only through the thinnest of threads. All too often, those threads can leave states unable to take action against financial practices that run afoul of consumer protection laws.

A. The Visitorial Powers Regulation Protects a Broad Range of Activities and Actors.

While the Comptroller has discretion to authorize activities beyond those specifically enumerated in the National Bank Act, the exercise of that discretion should "be kept within reasonable bounds." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995). This Court's words of caution to OCC have not stopped it from stretching its discretion to the limits in expanding the scope of approved activities. *See* Michael S. Edwards, *OCC Interprets the National Bank Act to Permit Banks to Own Hotels and Windmills*, 59 Admin. L. Rev. 435 (2007) (discussing strained or misleading interpretations of precedent used by OCC in approving activities). OCC's list of authorized activities currently ranges from those that are quintessential banking services—such as making loans and offering credit cards—to activities far afield from the traditional business lines of a bank, or, indeed, the expertise of a financial regulator. These include unrelated products and services such as "welfare-to-work" counseling, selling automotive roadside assistance programs, or offering health insurance benefits counseling. *See* OCC, *Activities Permissible for a National Bank, 2007*, at 8, 16 (2008), *available at* http://www.occ.treas.gov/

corpapps/BankAct.pdf. Moreover, OCC has explained this list is subject to further expansion. *See id.* at 1 ("The business of banking is an evolving concept and the permissible activities of national banks similarly evolve over time.").

The swath of state investigative and enforcement power taken away by OCC's broad definition of activities authorized or permitted by federal banking law is further compounded by the lower courts' expansive interpretations of the parties who enjoy the National Bank Act's protections for nationally chartered banks. The lower courts have already expansively interpreted this Court's decision in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), to mean that independent contractors or third-party companies who have business relationships with federally chartered banks are the same as the bank itself (or its operating subsidiaries) for the purposes of preemption analysis. *See State Farm Bank, FSB v. Reardon*, 539 F.3d 336, 345 (6th Cir. 2008) (holding *Watters* preempts regulation of the independent contractors of a federally chartered thrift to the extent that the law would be preempted against the thrift itself under the Home Owners Loan Act); *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 532 (1st Cir. 2007) (relying on *Watters* in holding that a state law applicable to "third-party agents" who sold a national bank's financial products was preempted if the law was preempted against the national bank itself).

The logical next step, if the National Bank Act is interpreted to cast a shadow that long over agents of banks, is a claim—by the agent, the bank, or OCC

itself—that these agents also lie in the shadow of exclusive visitation authority. By virtue of simply arranging a customer's car loan with a national bank, is the car dealer thereby sheltered from state enforcement?[7] The implications are troubling indeed. As one commentator has observed, on one hand, the banks and regulators seek to maintain an identity between agents and the banks for regulatory purposes, while at the same time seeking to distance themselves from the acts of those agents. *See* Peterson, *supra*, at 546-47. OCC's attempt to protect these third parties, along with very practical considerations that impede any banking regulator's ability to provide adequate oversight of such agents, may have the unintended consequence of attracting agents "less adverse to predatory lending than the banks they represent." *Id.* at 542. The potential for a gap in oversight under this scheme is obvious, and raises precisely the prospect for muddled political accountability about which this Court has expressed concern. *See, e.g., Printz v. United States*, 521 U.S. 898, 930 (1997).

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[7] The OCC has issued an opinion letter which, while less than thoughtful in analysis, preempts state consumer protection laws as to a car dealer when, by arranging car loans with a national bank, it is acting as the agent of a bank. *See* Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 Am. U. L. Rev. 515, 530-31 (2007) (citing Preemption Determination, 66 Fed. Reg. 28593, 28595 (OCC, May 23, 2001)); *cf. Scott Runyan Pontiac-Buick* 461 S.E.2d at 526 (noting that consumer protection would be stripped of its efficacy if financial institutions could avoid enforcement for facilitating fly-by-night retailers).

The endgame appears to be that virtually no activity conducted by a national bank, or a party working with a national bank, may be investigated by a state official or subject to state enforcement action without constituting a prohibited exercise of "visitorial powers." This result appears to be true even if the national bank's illegal conduct concerns a law that is a matter of quintessential state concern. *Compare* 12 C.F.R. § 7.4000(a)(2)(iii), (iv) (defining "visitorial powers" as "[e]nforcing compliance with *any* applicable federal or state laws *concerning* those activities . . . authorized or permitted pursuant to federal banking law" (emphases added)), *with id.* § 34.4(b) (listing as not ordinarily preempted certain state laws essential to the legal infrastructure that supports the ability of national banks to conduct real estate lending, such as contract law, tort law, and criminal law).

Preventing state officials from ensuring national banks' compliance with necessary state laws whenever they touch an activity authorized or permitted by federal banking law is at odds with this Court's declaration just two years ago that "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the [National Bank Act]." *Watters*, 127 S. Ct. at 1567. Nothing in *Watters*, or any of the cases it relies on for this proposition, suggest that federally chartered banks are exempt from the provisions in generally applicable state laws that give state officials power to investigate and enforce the dictates of those laws.

B. The Broad Ability To Circumvent State Officials Using the Visitorial Powers Regulation Is Already Becoming Clear and Preventing States from Addressing Pressing Public Policy Concerns.

It did not take long after the promulgation of the visitorial powers regulation for its effects on the states' ability to protect their citizens from abusive financial practices to be realized. A recent court battle between the West Virginia Attorney General and Capital One demonstrates just such a reality.

In that case, Capital One's credit card practices had been subject to a multi-year investigation by the Attorney General's consumer protection division. The investigation was based on consumer complaints about misrepresentations in advertisement for Capital One credit cards, unfair terms in those cards, and difficulties it created for customers who wanted to close their accounts. *Capital One Bank (USA), N.A. v. McGraw*, 563 F. Supp. 2d 613, 614-15 (S.D. W. Va. 2008). Three years into the investigation, Capital One changed its status from a Virginia-chartered state bank to a national bank chartered by OCC. *Id.* at 615. Less than two weeks after switching charters, Capital One filed suit in the United States District Court for the Southern District of West Virginia seeking a declaration that the investigation violated OCC's "visitorial powers" and required the Attorney General to cease its activities. *Id.* at 615-16. Judge Goodwin recognized that Capital One sought "to usurp West Virginia's power to investigate whether

national banks have violated West Virginia consumer protection law" and that the West Virginia's Attorney General's "lawful investigation was hijacked by Capital One's conversion to a national bank." *Id.* at 622. But regardless of the fact that the Attorney General's investigation focused solely on Capital One practices during a period of time when it was neither nationally chartered nor supervised by OCC, the court—heavily relying on the Second Circuit's opinion in *Cuomo*—ordered the Attorney General to stop the investigation against the bank. *Id.* at 621-22.

Judge Goodwin did, however, hold that the Attorney General had one other avenue available to continue its investigation—one that Capital One quickly tried to close off as well. In addition to investigating Capital One, West Virginia issued a subpoena to Capital One Services, Inc. ("COSI"), which was neither a division of the national bank nor an operating subsidiary. Judge Goodwin held that without such a relationship between COSI and Capital One, an investigation of COSI did not violate the "visitorial power" regulation. *Id.* at 623-28. However, six months later, Capital One gained approval from OCC to convert COSI into an operating subsidiary, and Capital One moved for relief from the order allowing the investigation against COSI to continue. *See Capital One Bank (USA), N.A. v. McGraw*, No. 08-cv-165 (S.D. W. Va. Jan. 26, 2009). Although Judge Goodwin refused to amend the judgment because Rule 60(b)(6) relief "is not for the purpose of relieving a party from free, calculated, and deliberate choices," the ability of

national banks to manipulate corporate forms to avoid state investigations is quite clear. *Id.*

Not only have national banks already begun using the visitorial powers regulation to avoid state law enforcement, but its use also threatens to hamper state officials in their efforts to address the growing foreclosure crisis—a matter of quintessential state concern given that debt collection and foreclosure are creatures of state law.[8] Key to understanding the current foreclosure crisis is investigating the dealings between struggling borrowers and the companies that "service" mortgage loans by collecting payments, maintaining accounts, and handling correspondence with borrowers.

One of the reasons that ensuring consumers' fair treatment by servicers is currently a major concern is the growing evidence that some servicers

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[8] Given that debt collection and foreclosure operate using state judicial and law enforcement infrastructure, citizens likely will hold their state policymakers accountable for problems related to those subjects. Federalism-related concerns therefore are raised by federal law limiting state policymakers' ability to investigate and correct problems related to collections and foreclosure. *See* Pet. Br. 43-45. Such an interpretation would also undermine state and local licensing schemes that govern the conduct of a range of third parties that engage in transactions with federally chartered banks—such as second hand car dealers and debt collection agencies. Such licensing schemes provide consumers with important protections, while creating a fair marketplace by leveling the playing field among businesses.

routinely violate consumer rights, which in these precarious times can exacerbate the foreclosure problem. Academic studies and court proceedings, especially in bankruptcy courts, have exposed an industry rife with sloppy accounting, at best, and at worse a mindset that simply views a homeowner's account as a source for revenue through the imposition of questionable fees that strapped homeowners are unable to afford. *See, e.g.*, Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 Tex. L. Rev. 121 (2008); *Federal Trade Comm'n v. EMC Mortgage Corp.*, No. 08-cv-338 (E.D. Tex. Sept. 9, 2008) (stipulated final judgment and order) (settling allegations of illegal mortgage servicing conduct by requiring $28 million compensation to customers).

National banks are not immune from this phenomenon. *See, e.g.*, *In re Stewart*, 391 B.R. 327, 340 (Bankr. E.D. La. 2008) (holding Wells Fargo, responsible for "systematic" errors in the way it serviced loans of borrowers in bankruptcy). In at least one case, a national bank member of the Clearing House has invoked the exclusive visitorial authority of OCC to argue that it is so broadly shielded from investigation that even a federal bankruptcy court cannot consider whether its servicing practices violated state law. *See In re Stewart*, No. 07-11113, 2008 WL 5096011, at *6 (Bankr. E.D. La. Oct. 15, 2008). Although the bankruptcy court held the "courts of justice" exception to the visitorial powers regulation led this argument to be "frivolous" when applied to the court's own authority, *id.*, a state official enforcing that servicer's compliance with state collections and

foreclosure law would receive no benefit from that exception under OCC's interpretation, *see* 12 C.F.R. § 7.4000(b)(2) (specifying the courts of justice exception does not apply to actions brought by state authorities).

Consequently, state policymakers already face the prospect of being unable to police abuses of their state debt collection and foreclosure laws by national banks. The broad sweep of the visitorial powers regulation, if upheld, portends that states may face a similar fate in trying to investigate the effectiveness of, and to enforce, their non-preempted laws in a much broader swath of public policy concerns.

III. OCC'S RECORD OF ENFORCEMENT OF CONSUMER PROTECTION LAWS IS INADEQUATE TO SUPPORT THE EXTENSION OF EXCLUSIVE VISITORIAL AUTHORITY TO NON-PREEMPTED STATE LAW.

OCC, in effect, has told the citizens of the all the states to trust that it will be as rigorous in protecting their rights under state law as their own officials have been. But the agency's history of enforcement of federal consumer protection laws, regulations, and its own guidance—much less non-preempted state consumer protection laws—fails to build the necessary record to support the extension of OCC's exclusive enforcement powers created by the visitorial powers regulation.

There are a variety of systemic reasons that explain OCC's shallow record of enforcement. The

discussion of Capital One's actions to evade West Virginia's effort, *see supra* Section II.B, is an example of one of those reasons—regulatory arbitrage.[9] Another explanation lies in the agency's focus and priorities. OCC's traditional focus and experience has been on safety and soundness, rather than consumer protection. *See* Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 Temp. L. Rev. 1, 73 (2005); Bar-Gill & Warren, *supra*, at 90. Its record on consumer protection enforcement is one of little experience and little evidence of expertise.

In contrast, as already noted, the states have long experience in enforcement of non-preempted state consumer protection laws. Following *St. Louis*, state attorneys general brought non-discriminatory consumer protection enforcement actions against national banks, even when the conduct involved authorized bank powers. *See supra* Section I. This activity occurred over the course of more than two decades during which OCC was virtually silent, a fact that even the agency has acknowledged.

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[9] A system where regulated entities can shop for the most favorable legal regime and regulatory enforcement can lead to "regulatory arbitrage." *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 79-83 (2008). OCC, then, also has financial incentives to create an enforcement regime attractive to industry that attracts additional institutions. *See* Pet Br. 51.

A. OCC's Record on Consumer Protection Enforcement: Recent, Reluctant, and Inadequate.

OCC's consumer protection authority is grounded in two different categories of federal law, and the experience under neither gives grounds for confidence in vigorous enforcement of consumer protection. Though the agency purports to exercise much of its enforcement muscle behind the scenes, what is visible suggests instead that the agency may act vigorously only when pushed by external events. This appears to be especially the case if it means challenging the practices of the larger banks it supervises, and from whom most of its assessments come. Until 2008, it had taken no public consumer protection enforcement actions against a major bank. *See* Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 232 (2004). From all appearances, as we describe in Section III.C, the action last year is the exception that proves the rule of OCC's reluctant efforts for consumer protection.

Federal consumer protection laws such as the Truth in Lending Act (TILA) and the Equal Credit Opportunity Act (ECOA) explicitly charge OCC with enforcement authority. *See* 15 U.S.C. §§ 1607(a)(1)(A) (TILA), 1691c(a)(1)(A) (ECOA). From 1987 to the present, OCC brought only four formal enforcement actions under ECOA and its implementing regulation, and from 1999 to 2007, OCC made no referrals under ECOA to the U.S.

Department of Justice of matters involving race or national origin discrimination in mortgage lending. From 1997 to 2007, the Federal Reserve Board reported just nine formal enforcement actions against banks by OCC under TILA.[10]

Even more telling is OCC's history with the prototypical consumer protection laws. All of the agency's enforcement of state and federal laws against unfair or deceptive acts or practices is both of recent vintage and not robust. OCC admits that it was not until 2000 that it invoked long-dormant consumer protection authority provided by the 1975 amendments to the Federal Trade Commission Act. *See* Julie L. Williams & Michael L. Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 Bus. Law. 1243, 1244, 1246 & n.25, 1253 (2003) (citing authority from the early 1970s indicating that OCC had the authority to bring such an action under Section 8 of the Federal Deposit Insurance Act, noting that OCC brought its first such case in 2000, and conceding that "[a]n obvious question is why it took the federal banking agencies more than twenty-five years to reach

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[10] Information on OCC's enforcement actions is contained in annual reports that the Federal Reserve Board and the U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f; Board of Governors of the Federal Reserve System, Annual Report, *available at* http://www.federalreserve.gov/boarddocs/rptcongress/; U.S. Attorney General, Annual Report to Congress Pursuant to the Equal Credit Opportunity Act, *available at* http://www.usdoj.gov/crt/housing/housing_special.php.

consensus on their authority to enforce the FTC Act").

OCC's first foray into the field was to become involved in an on-going investigation begun by California state officials against Providian National Bank, culminating in a joint settlement in 2000.[11] Though the bank was long known in the industry as a "poster child" for abusive practices, *see* Duncan A. MacDonald (former General Counsel, Citigroup Inc.'s European and North American card business), Letter to the Editor, *Comptroller Has Duty To Clean Up Card Pricing Mess*, Am. Banker, Nov. 21, 2003, at 17, the agency did not act until after California did. OCC's effort coincided roughly with the agency's 1999 expansion of the visitorial powers regulation to limit a state's right to enforce its own laws, *see* Pet. Br. 10. One industry lawyer explained that the two events were related, as the agency recognized that OCC "couldn't replace something with nothing" if it was going to try to displace state consumer protection enforcement. *See Congressional Review of OCC Preemption*, *supra*, at 97.

In the decade since OCC dusted off its FTC Act enforcement authority, its performance on consumer protection has been unconvincing, at best. During that time, OCC has taken only a dozen enforcement actions. *See* OCC, Consumer Protection

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[11] *See* Press Release, OCC, Providian To Cease Unfair Practices, Pay Consumers Minimum of $300 Million Under Settlement with OCC and San Francisco District Attorney (June 28, 2000), *available at* http://www.occ.treas.gov/ftp/release/2000-49.txt.

News: Unfair and Deceptive Practices, http://www.occ.treas.gov/Consumer/Unfair.htm. Moreover, OCC has a history of ignoring consumer complaints regarding predatory lending practices by its banks, and indeed refusing to intervene on behalf of consumers, considering allegations of abusive practices "private party situation[s]." Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown—States Federal Agencies Clashed on Subprimes as Market Ballooned*, Wall St. J., Mar. 22, 2007, at A1 (quoting OCC's response to an elderly consumer with an abusive loan originated by a national bank).

It is also unclear whether OCC examiners even look for violations of non-preempted state consumer protection laws. In defending OCC's consumer protection record before Congress, the Comptroller chronicled various federal laws that its examiners ensure national banks meet but did not once speak of any effort to enforce state consumer protection laws. Most tellingly, he summarized OCC's consumer protection role as being "responsible for ensuring that national banks comply with applicable *federal* consumer protection laws." *Improving Federal Consumer Protection in Financial Services*, *supra*, at 128 (written testimony of John C. Dugan, Comptroller of the Currency) (emphasis added). Specifically relevant to this case, OCC's handbook detailing fair lending examination procedures for its bank examiners fails to include any mention of state antidiscrimination laws. *See* OCC, *Fair Lending Examination Procedures: Comptroller's Handbook* (2006), *available at* http://www.occ.treas.gov/handbook/fairlep.pdf.

While the agency has tried to deflect criticism of its record and that of the national banks it supervises by pointing to worse abuses by entities not under its regulation, it has failed to address problems that were—or are—clearly and unequivocally in its own house. The agency has also repeatedly defended its thin public record of enforcement by claiming, in essence, that it takes care of problems in the privacy of the home. Far from providing the kind of transparency that brings accountability, the agency's message instead is to tell consumers, in short: "Trust Us." *See* Stephanie Mencimer, *No Account*, The New Republic, Aug. 27, 2007, at 14.

But the publicly available record leaves us less than sanguine that it has earned such blind trust. The story of OCC's enforcement is that its actions are few, and, particularly when larger banks are involved, by all appearances too often occur only when its hand is forced. In the following section, we discuss a few of those problems, and OCC's inadequate response.

B. Preacquired Account Marketing: Banks in Partnership with Deceptive Direct Marketers.

The right to partner with third-parties to market products wholly unrelated to banking services is among the permitted incidental activities for national banks. Preacquired account marketing programs are a particular kind of frequently abused direct marketing of products that require the full

participation of banks. Banks provide third-parties with personal information about credit card or mortgage account holders and their accounts to use in targeted marketing for usually low-value, high-margin add-on products. The bank's name is typically used in the promotional materials and calls. But the most insidiously deceptive feature of the arrangement is that the relationship with the bank provides the marketer with a "back-door" means of charging the consumer's account based on its own interpretation of "consent" to a "free" opt-out thirty-day trial period. Often consumers were unaware they "consented" to the trial period, and were certainly unaware the marketer had the means to place a charge for the service on their credit card or mortgage account after thirty days, since the consumer did not give them account information.[12]

States pursued these unfair and deceptive practices vigorously against all the participants in these schemes, including major banks Chase, Citi, and First USA-Bank One. OCC, by contrast, not only failed to uncover such abuses in their supervision of these entities, but affirmatively intervened to try to prevent Minnesota's action against Fleet Mortgage Corporation, an operating subsidiary of a national bank, when its participation in one of these schemes resulted in unauthorized

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[12] For a more complete description of preacquired account marketing, see Comments of the Attorneys General, *In the Matter of Telemarketing Review--Comment*, FTC File No. R411011, at 29-34 (Apr. 15, 2002), *available at* http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf.

charges to customers' mortgage accounts. *Minnesota v. Fleet Mortgage Co.*, 181 F. Supp. 2d 995 (D. Minn. 2001).[13]

Though the states' efforts to combat preacquired account marketing abuses by national banks clearly made OCC aware of this problem (as demonstrated by its own effort to stop Minnesota's suit), it was the states that subsequently acted against a repeat national bank offender. A complaint filed against Chase by the State of California in 2005 describes another preacquired account marketing scheme where the mechanism for paying for such non-banking products was to cash checks issued by Chase for what appears to be a "reward." Signing the check for a sum up to $10 actually enrolled customers in the "free" trial membership, again requiring them to take affirmative action to opt-out. *People v. Chase Bank USA, N.A.* No. GIC850483 (Cal. Super. Ct. July 12, 2005), *available at* http://ag.ca.gov/newsalerts/cms05/05-054_0a.pdf. Chase ultimately entered into a settlement with California and other state attorneys general to repay victims of the scheme $14.5 million, although it maintained in the settlement that the states' enforcement action constituted a prohibited exercise of visitorial powers. *See People v. Chase Bank USA, N.A.*, No. GIC850483 (Cal. Super. Ct. Dec. 2006), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/2006-12-11_Chase_Settlement_Judgment.pdf.

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[13] The court rejected OCC's claim of exclusive visitation.

There is no record that OCC has been similarly aggressive against such abuses. Its only public response to these marketing abuses has been its effort to stop Minnesota's action against Fleet. Indeed, as explained in section II.A, the shadow of third-party agents being entitled to assert the shield of preemption makes the agency's silence more worrisome.

C. "Remotely Created Checks": Banks Facilitating Telemarketing Fraud.

After three years without taking a single public consumer protection enforcement action, OCC took its first action against a major bank in 2008. *See* Press Release, OCC, OCC Directs Wachovia to Make Restitution to Consumers Harmed by the Bank's Relationships with Telemarketers and Payment Processors (Apr. 25, 2008), *available at* http://www.occ.gov/ftp/release/2008-48.htm. But the history behind that action suggests it does not signal OCC's launch of a newly aggressive and energetic focus on consumer protection. Instead, it reinforces the view of a reluctant agency forced to act by external events.

OCC's investigation appears to have resulted from actions pursued by others, and its initial resolution did not place a high priority on aiding consumers who were harmed by the bank's activities. Only after a legal challenge was mounted to a weak settlement did OCC finally reach a resolution that both adequately enforced consumer protection laws and was sufficient to deter other banks from facilitating telemarketing fraud.

Telemarketing fraud perpetrators have made full and imaginative use of "innovative" banking products to bilk millions of dollars from consumer bank accounts. *See Improving Federal Consumer Protection in Financial Services*, *supra*, at 215-16 (written statement of Thomas J. Miller, Attorney General, State of Iowa) (summarizing states' efforts to stop fraudulent telemarketing schemes). One of these scams involves fraudulently obtaining bank account information, which is then used to create a type of check that consumers do not write or sign, called "remotely created checks." Victims are harmed not only by the unauthorized withdrawals initiated by these unsigned checks, but they are then often subjected to fees for having overdrawn accounts. State attorneys general and the Federal Trade Commission have been very active in fighting the telemarketers themselves, and the payment processing companies who create these unsigned checks.

For the scam to work, it is necessary to find a bank willing to accept the payment processing companies as customers, process these unsigned checks, and then turn a blind eye to the evidence that those customers are participating in fraud. Evidence that Wachovia might be doing just that came to light during a Department of Justice prosecution against a payment processor in late 2006. *See United States v. Payment Processing Ctr., LLC*, 461 F. Supp.2d 319, 330 n.11 (E.D. Pa. 2006)

[hereafter *PPC*].[14] The bank continued to do business with the company despite a huge rate of charge-backs (a fraud red-flag), and warnings by its own risk management staff (advising the bank to sever the relationship despite the loss of a revenue-generating customer), by other banks, and even by the Social Security Administration. *See* Charles Duhigg, *Bilking the Elderly, With a Corporate Assist*, N.Y. Times, May 20, 2007, at 1; Charles Duhigg, *Papers Show Wachovia Knew of Thefts*, N.Y. Times, Feb. 6, 2008, at C1.

PPC was not the only Wachovia customer actively participating in telemarketing fraud; others were targets of investigations by the Federal Trade Commission. OCC examiners apparently did not discover this during their own investigation, but only pursued the expanded inquiry after being informed of these additional relationships by private attorneys for PPC victims and prosecutors. *See* Plaintiffs' Memorandum in Support of the Petition for Approval of the Agreed Attorneys' Fees and Costs, *Faloney v. Wachovia Bank*, No. 07-1455 (E.D. Pa.) and *Harrison v. Wachovia Bank*, No. 08-755 (E.D. Pa.) at 3-4, 12, 15.

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[14] The court's order in a dispute over PPC's frozen accounts was issued November 8, 2006, and OCC's investigation apparently began that same month. While OCC investigations are secret, making it impossible to know for certain what prompted this one, OCC specified that its April 2008 original settlement with Wachovia concluded an 18-month investigation.

OCC originally announced a settlement agreement that provided for "potential claims" of $125 million for victims harmed by the bank's actions. *See* Charles Duhigg, *Big Fine Set for Wachovia to End Case*, N.Y. Times, Apr. 26, 2008, at C1. The agreement provided for cumbersome and lengthy claims process, which would have likely reduced the restitution actually paid to less than $15 million.[15] The use of this process would have favored the bank, to which any unclaimed funds reverted, over the victims. OCC's use of this claims process is particularly inexplicable when many of the victims are the vulnerable elderly. *See* Duhigg, *Bilking the Elderly, supra*, at 1.

This settlement, consequently, was challenged as inadequate by private intervenors, in an action supported by three members of Congress as *amici*.[16] Only then did OCC amend the settlement to provide

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[15] See *Sylvester v. CIGNA Corp.*, 369 F. Supp. 2d 34, 44 (D. Me. 2005), in which the court references expert testimony that claim return rates are ten percent or less in most settlements. *See also* Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747 (1998).

[16] *See* Motion and Brief of Representatives Barney Frank, Edward Markey and Joseph Sestak, in support of the Intervenor *Faloney* Plaintiff's Motion for an Injunction Under the All Writs Act, *USA v. Payment Processing Center, LLC*, No. 06-0725 (E.D. Pa. May 29, 2008). The North Dakota Attorney General expressed similar concerns, *see* Memorandum of Law of Faloney Plaintiffs in Support of Motion for Injunctive Relief Pursuant to the All Writs Act, 28 U.S.C. §1651, *USA v. Payment Processing Center, LLC*, No. 06-0725 (E.D. Pa. May 9, 2008) at 16.

for direct restitution payments to the victims. *See* Press Release, OCC, Wachovia Enter Revised Agreement to Reimburse Consumers Directly (Dec. 11, 2008), *available at* http://www.occ.gov/ftp/release/2008-143.htm.

Once again, OCC was responsive to its consumer protection responsibilities only when moved by outside forces and, until challenged in court, favored the interests of the bank that allegedly wittingly facilitated the fraud, over the interests of consumers.

D. Toxic Mortgages: National Banks' Practices Contribute to the Severe Economic Toll.

OCC's efforts to deflect attention from its poor record by pointing to the non-depository originators as the culprits in today's mortgage crisis is ignores the much larger and more complicated story of regulatory failures, including its own. Taking a step back to look at this larger frame, evidence of weak enforcement even of OCC's own guidelines takes on enhanced significance. It militates against sanctioning OCC's claimed right to exclusively enforce the states' laws as well.

Today's mortgage crisis has its roots in the fact that the subprime and "Alt-A" (other non-prime loans) markets were dominated by two characteristics: 1) a virtual collapse in underwriting, meaning loans were made without regard to the ability to pay, relying instead on the assumption that they could be repaid through continued

refinancing or sale if necessary; and 2) a marked prevalence of loan products and terms that exacerbated the risk of failure.[17]

These risk-enhancing features included adjustable rates, highly complex negatively amortizing features, and little or no information on or documentation of income and assets. Multiple risk-enhancing features were often layered in individual loans, making them more fragile.

That these characteristics came to be so prevalent resulted from both origination practices, and the practices on the secondary market, which paid more for the riskier products. *See, e.g.*, Moody's Investors Service, Structured Finance in Focus, The Subprime Decline—Putting It in Context 3 (Mar. 25, 2008) ("The subprime crisis is largely a product of increasingly aggressive mortgage loan underwriting standards adopted as competition to maintain origination volume intensified amid a cooling

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[17] *See, e.g.*, Lei Ding et al., Risky Borrowers or Risky Mortgages: Disaggregating Effects Using Propensity Score Models (December 2008) (working paper at 16-17), *available at* http://www.ccc.unc.edu/abstracts/091308_Risky.php (finding risk may relate more to loan products and terms common to subprime market than borrower risk); Ellen Schloemer et al., *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners* 21 (2006) (noting that among 2003 vintage originations there was a nearly 64% increase in foreclosure risk for loans requiring limited documentation of income and assets compared to fully-documented loans and a 117% increase in foreclosure risk among adjustable rate mortgage compared to fixed-rate loans), *available at* http://www.responsiblelending.org/pdfs/foreclosure-paper-report-2-17.pdf.

national housing market."); Jon Meacham & Daniel Gross, *The Oracle Reveals All*, Newsweek, Sept. 24, 2007, at 32 (quoting Alan Greenspan explaining that investors' demand, not borrowers', drove the market).[18] When the actions of financial institutions on both the front-end and the back-end are taken into account, virtually no major financial institution or regulator can credibly evade responsibility.

Though OCC issued multiple guidances about underwriting and sound practices,[19] the record of

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[18] Countrywide's compensation structure for both brokers and its own in-house loan officers rewarded them most for the riskiest loans, and least for the most stable products: broker commissions were as much as 2.5% for the adjustable rate, negatively amortizing "payment option ARMs," 1.88% for subprime loans, but just 1.48% for standard, fixed rate loans. *See* Ruth Simon & James R. Hagerty, *Countrywide's New Scare-Option ARM Delinquencies Bleed Into Profitable Prime Mortgages*, Wall St. J., Oct. 24, 2007, at C1; *see also* Gretchen Morgenson & Geraldine Fabrikant, *Countrywide's Chief Salesman and Defender*, N.Y. Times, Nov. 11, 2007, § 3 at 1 (former employee discussing compensation system). Countrywide made mortgage loans through multiple entities, including a bank under OCC supervision until March 2007.

[19] *E.g.* OCC, *Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices*, Adv. Ltr. 2003-2 (Feb. 21, 2003); OCC, *Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans*, Adv. Ltr. 2003-3 (Feb. 21, 2003); OCC, *Guidelines Establishing Standards for Residential Mortgage Lending Practices*, 70 Fed. Reg. 6329 (Feb. 7, 2005). It also issued guidances jointly with other federal financial regulators. *E.g. Interagency Guidance on Nontraditional Mortgage Product Risks*, 71 Fed. Reg. 58,609 (Oct. 4, 2006); *Statement on Subprime Mortgage Lending*, 72 Fed. Reg. 37,569 (July 10, 2007); *Illustrations of Consumer*

(Continued)

some of the banks it supervise suggests poor follow-through on its exhortations. At the request of National City Mortgage, OCC stopped a Washington State inquiry into its mortgage practices in 2002. *See* Eric Nalder, *Mortgage System Crumbled While Regulators Jousted,* Seattle Post-Intelligencer, Oct. 11, 2008, at A1. The following year the parent, National City Bank and its subprime operating subsidiary First Franklin, sought an OCC ruling exempting national banks from state anti-predatory mortgage lending laws. *See* 68 Fed. Reg. 46,264 (Aug. 5, 2003). Those two entities went on to concentrate on such poorly underwritten loans that neither institution survived the current economic downturn intact. First Franklin even made OCC's own list of the "Worst Ten in the Worst Ten"—the originators with the largest number of foreclosures in the metropolitan areas with the highest foreclosure rates. *See* Letter from John Dugan, Comptroller of the Currency, to Elizabeth Warren, Chair, Congressional Oversight Panel (Feb. 12, 2009) (listing First Franklin and two other significant subprime lenders under OCC's supervision on the list); *see also* Patricia A. McCoy et al., *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure,* 41 Conn. L. Rev (forthcoming 2009).

Looking at the record from five of the nation's largest banks, all under OCC supervision, does not

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Information for Nontraditional Mortgage Products, 72 Fed. Reg. 31,825 (June 8, 2007).

build confidence in OCC's ability to take on the additional load of enforcing non-preempted state consumer protection and civil rights laws. These banks

> made heavy inroads into low- and no-documentation loans. The top-ranked Bank of America, N.A. had a thriving stated-income and no-documentation loan program which it only halted in August 2007, when the market for private-label mortgage-backed securities dried up. Bank of America securitized most of those loans, which may be why the OCC tolerated such lax underwriting practices. Similarly, in 2006, the OCC overrode public protests about a "substantial volume" of no-documentation loans by JPMorgan Chase Bank, N.A., the second largest bank in 2005, on grounds that the bank had adequate "checks and balances" in place to manage those loans.

McCoy, *supra* (manuscript at 35). Wachovia Bank, a major issuer of these loans, suffered a huge jump in losses on them. *Id.* at 36. Wells Fargo Bank admitted in a 2007 prospectus for a securitized pool of loans requiring little documentation from borrowers that it "had relaxed its underwriting standards in mid-2005 and did not verify whether the mortgage brokers who had originated the weakest loans in that loan pool complied with its underwriting standards before closing"; by mid-2008,

over one in five loans in the pool were in trouble. *Id* at 36-37.

Without a transparent record, we do not know how well OCC enforces even its own rules and guidances as to mortgage practices, much less any non-preempted state laws that might be relevant. But even the Treasury Department's Office of the Inspector General has raised questions about whether the OCC's general reluctance to exercise its enforcement authority may in fact encourage banks to put off addressing their problems. *See* Office of the Inspector General, *Audit Report, Safety and Soundness: Material Loss Review of ANB Financial, N.A.* 13, 19 (2008), *available at* http://www.treas.gov/inspector-general/audit-reports/2009/oig09013.pdf.

In contrast to OCC's record, the states indeed became quite active in enforcing consumer protections law against lenders—including, in particularly stark contrast to OCC's enforcement record, large institutions—from an early point in the subprime bubble, and have remained so. *See supra* Section I. Especially given the tools available to them in a largely deregulated environment, states have been very aggressive.

It was erroneous of OCC to not consider those comparative records of enforcement when promulgating the visitorial powers regulation. Accordingly, that regulation cannot lead the Court to alter the right of states to enforce non-preempted state laws as established in *St. Louis*.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

March 4, 2009

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AMICUS CURIAE BRIEF

No. 08-453

IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his official capacity as Attorney General for the State of New York,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of respondents.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

This is such a case. The Chamber's members include not only national banks and their operating subsidiaries but also millions of other businesses subject to federal statutes and regulations that preempt state and local laws. The power of Congress (either directly or through administrative agencies)

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. A letter from the Solicitor General consenting to the filing of this brief, as well as letters reflecting petitioner's and the Clearing House's blanket consent to the filing of *amicus curiae* briefs, are on file with the Clerk.

to preempt state and local law, as well as the circumstances in which federal preemption should be found to exist, are vitally important to business and to the national economy. Accordingly, the Chamber and its members have a substantial interest in ensuring that this Court properly resolves the issues raised in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons explained by respondents, the Comptroller of the Currency's visitorial powers regulation, 12 C.F.R. § 7.4000, provides the best reading of the term "visitorial powers" in the visitorial powers statute, 12 U.S.C. § 484(a). Because the Comptroller's regulation contains the best interpretation of the statutory terms, and because it is undisputed that giving effect to that reading of the statute would dictate affirming the judgment of the court of appeals, this Court could affirm the judgment below without addressing whether the regulation is entitled to *Chevron* deference. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 865-66 (1984).

Insofar as the Court addresses that question, petitioner and his *amici* argue strenuously that the visitorial powers regulation should be denied *Chevron* treatment, because, they assert, the regulation is "an agency declaration about preemption." Pet. Br. 53. The contention that the regulation falls outside of *Chevron* because it in effect "declares preemption" gains the most elaborate treatment in an *amicus* brief filed by the National Governors Association (NGA) and various other entities. According to the NGA and petitioner, courts, not agencies, should

bear principal responsibility for determining the existence and scope of federal preemption. Petitioner and the NGA accordingly submit that an agency should be considered to lack any authority—and thus to command no deference—on matters of preemption unless Congress expressly delegates to the agency specific authority to preempt state law. They conclude that Congress has not specifically delegated preemptive authority to the Comptroller, and that the Comptroller's visitorial powers regulation therefore is not entitled to *Chevron* deference.

The Chamber of Commerce submits this brief in response to the arguments pressed by petitioner and the NGA, and in particular, to explain that petitioner and the NGA: (i) misconceive the way in which the Comptroller's regulation affects the scope of federal preemption; and (ii) misunderstand the circumstances in which *Chevron* deference extends to agency regulations bearing on preemption. Contrary to the characterization of petitioner and the NGA, the visitorial powers regulation does not purport simply to "declare" state law preempted by federal law. Rather, the regulation engages in the quintessential *Chevron* function of setting forth an authoritative interpretation of substantive statutory terms bearing directly on the agency's responsibilities, *viz.*, an interpretation of the critical statutory term "visitorial powers." Although interpretation of those statutory terms in turn affects the circumstances in which the statute preempts state visitorial authority, that preemptive consequence arises from *Congress*'s decision to render the visitorial powers statute preemptive, not from an *agency* declaration of preemption. This Court has settled that

preemptive consequences of that kind—*viz.*, preemption dictated by the *statute* itself—afford no basis for declining to give full *Chevron* deference to the agency's interpretation of the statute. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996).

Even assuming *arguendo* that the Comptroller's regulation were not squarely governed by the Court's decision in *Smiley*, the arguments made by petitioner and the NGA for denying the regulation *Chevron* treatment are unpersuasive. The premise of those arguments is that an agency generally lacks authority to effect preemption "on the agency's own authority," NGA Br. 3—*viz.*, absent a determination by Congress to preempt state law—unless Congress specifically delegates to the agency the power to preempt state law. That premise cannot be squared with this Court's decisions. The Court has expressly held in a series of decisions that an agency's promulgation of a preemptive regulation is fully entitled to *Chevron* treatment notwithstanding that the agency acts under a general grant of rulemaking authority rather than any specific delegation of authority to preempt state law. That conclusion is fully consistent with the assumptions underlying *Chevron*: contrary to the argument of petitioner and the NGA, agencies, no less than courts, are well-suited to address the scope of federal preemption, because the decision to preempt state law is fundamentally a *policy* judgment of the kind within the core of an agency's traditional *Chevron* authority.

The decisions relied on by petitioner and the NGA do not suggest that courts should decline to defer to agency determinations about preemption. Instead, this Court has settled that, "*even in the area of*

pre-emption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *New York v. FCC*, 486 U.S. 57, 64 (1988) (emphasis added) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Petitioner and the NGA fail to come to terms with that long-settled understanding, and their failure to do so undermines their arguments for declining to accord *Chevron* deference to the Comptroller's visitorial powers regulation.

ARGUMENT

I. THIS COURT ACCORDS BROAD DEFERENCE TO AN AGENCY'S INTERPRETATION OF A STATUTE WHERE, AS HERE, THE STATUTE ITSELF IS PREEMPTIVE

Agency regulations may affect the existence and extent of federal preemption in a number of ways. First, and of particular salience here, when a statute bearing on the agency's responsibilities itself preempts state law, the agency's interpretation of the statutory terms might in turn affect the statute's preemptive scope. Alternatively, an agency might adopt a substantive regulation having the force of law and prescribe that the regulation preempts state law or precludes state enforcement activities, in which case the agency rather than Congress would dictate the preemptive result. Finally, an agency might take action designed solely to declare the preemption of state law.

The Comptroller's visitorial powers regulation fits squarely within the first category. It therefore commands full *Chevron* deference under this Court's precedents. *See Smiley*, 517 U.S. at 743-44. And in any event, even assuming *arguendo* that the regulation falls outside the four corners of the first category, it does not "merely purport to declare the preemptive scope of a federal statute." Pet. Br. 52. Rather, it construes statutory terms that directly bear on the agency's exercise of its responsibilities. There is thus no sound basis for declining to accord the regulation *Chevron* deference.

A. The Comptroller's Regulation Implements The Substantive Terms Of A Statute Made Preemptive By Congress

This Court extends *Chevron* deference "to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes they are charged with administering." *Smiley*, 517 U.S. at 739. And it is settled that such deference "extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws." *Id.*; *see NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995).

The Comptroller's visitorial powers regulation interprets the term "visitorial powers" in the visitorial powers statute, 12 U.S.C. § 484(a). That statute prescribes that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law," *id.*, and federal law otherwise makes clear that the Comptroller bears responsibility for exercising visitorial authority over national banks. *See*

Nationsbank, 513 U.S. at 254 (Comptroller is "charged by Congress with superintendence of national banks"). The Comptroller's visitorial powers regulation sets forth that "visitorial powers include," *inter alia*, "[e]xamination of a bank," "[i]nspection of a bank's books and records," and "[e]nforcing compliance with any applicable federal or state laws concerning" a national bank's federally-authorized activities. 12 C.F.R. § 7.4000(a)(2)(iv).

Because that interpretation directly pertains to the agency's performance of its responsibilities, *see* 69 Fed. Reg. 1,895, 1,899 (Jan. 13, 2004) (regulation "clarif[ies] the scope of the visitorial powers authorized to the OCC pursuant to section 484"), the interpretation squarely implicates *Chevron*. *See, e.g.*, *Smiley*, 517 U.S. at 739; *Chevron*, 467 U.S. at 842-45. To be sure, the Comptroller's interpretation of "visitorial powers" has consequences for the scope of federal preemption of state enforcement authority. In particular, because the statute prescribes that "[n]o national bank shall be subject to visitorial powers *except as authorized by Federal law*," 12 U.S.C. § 484(a) (emphasis added)—and federal law confers visitorial power on the Comptroller and not, with very limited exceptions, the States—any matter falling within the Comptroller's visitorial authority necessarily falls outside the visitorial authority of state officials or agencies (and unauthorized federal officials or agencies) over national banks. But that preemptive consequence arises, not from the Comptroller's regulation, but instead from the statute itself, which by its terms makes federally-authorized visitorial authority exclusive. As the Comptroller explained when issuing the regulation, the "agency

is implementing a *statute* that has preemptive effect." 69 Fed. Reg. at 1,903 (emphasis added).

Petitioner and the NGA therefore err in supposing that this case involves a regulation in which an agency, rather than interpret "the substantive meaning of federal statutes," instead "merely purport[s] to declare the preemptive scope of a federal statute." Pet. Br. 52; *see* NGA Br. 30 (contending that Comptroller lacks "power to declare state law preempted"). To the contrary, the regulation interprets the substantive meaning of "visitorial powers" in Section 484(a); and Congress, not the Comptroller, prescribed the preemption of state law. There is thus no occasion to deny the regulation *Chevron* deference on the ostensible basis that it "declares the preemptive scope of a federal statute." Pet. Br. 48.[2]

B. The Court's Decision In *Smiley* Requires According *Chevron* Deference To The Comptroller's Regulation

This Court has resolved that where, as here, an agency interprets the substantive terms of a statute, the interpretation commands full *Chevron* deference notwithstanding that it might in turn affect the scope of preemption dictated by the statute itself.

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[2] It is of no moment that the regulation explains that "[o]nly the OCC . . . may exercise visitorial powers with respect to national banks," and that "[s]tate officials may not exercise visitorial powers with respect to national banks." 12 C.F.R. § 7.4000(a)(1). That language simply describes the preemptive consequence dictated by the *statute*. The Comptroller has not argued that the description aims *itself* to declare preemption of its own force.

The Court's decision in *Smiley v. Citibank, supra,* involved precisely that situation. *Smiley* concerned the Comptroller's interpretation of the term "interest" in 12 U.S.C. § 85, which permits a national bank to charge "interest at the rate allowed by the laws of the State" in which the bank maintains its main office. The Comptroller adopted a regulation construing the term "interest" to encompass late-payment fees. This Court extended deference to that interpretation and sustained it. 517 U.S. at 739-47.

The petitioner in *Smiley* argued that *Chevron* deference failed to apply to the regulation because it interpreted a statute that preempts state law, and the agency's interpretation of "interest" to encompass late-payment fees thus would have the effect of expanding the scope of the statute's preemption of state law. 517 U.S. at 743-44. In light of that consequence for preemption, the petitioner contended, "a court [should] make its own interpretation" of the statutory term "interest" rather than deferring to the agency's interpretation. *Id.* at 743. This Court rejected that argument, explaining that it "confuses the question of the substantive (as opposed to pre-emptive) *meaning* of a statute with the question of *whether* a statute is pre-emptive." *Id.* at 744. As to the "latter question," there was "no doubt" under this Court's decisions "that [the statute] pre-empts state law." *Id.* (citing *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978)). The sole question thus concerned the "substantive meaning" of the statutory term "interest," a question as to which *Chevron* deference fully applied. *Id.*

This case is controlled by *Smiley*. Here, as in *Smiley*, the pertinent statute is preemptive insofar as it precludes state visitorial authority. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13 (2007) (explaining that the visitorial powers statute "specifically vests exclusive authority to examine and inspect in OCC," thus rendering national banks "immune from state visitorial control"). Additionally, here, as in *Smiley*, the statute directly bears on the agency's performance of its enforcement responsibilities. And here, as in *Smiley*, the agency regulation interprets the substantive terms of the statute—the term "interest" in *Smiley* and the term "visitorial powers" here. As a result, here, as in *Smiley*, the fact that the agency's interpretation has consequences for the statute's preemptive reach provides no basis for declining to defer to the interpretation.

Smiley disposes of the NGA's contention that, "[i]n order to preserve the proper allocation of institutional roles, all predicate legal determinations that lead to a finding of preemption must be reviewed independently" by the courts rather than deferentially under *Chevron*. NGA Br. 29. The NGA expresses concern that according *Chevron* deference to the Comptroller's understanding of the term "visitorial powers" would "lead[] to the conclusion that state enforcement of state law is preempted, because it is a type of visitorial authority given exclusively to the OCC" under the statute. *Id.* But precisely the same concern could have been expressed in *Smiley* with respect to the agency's understanding of the term "interest," which likewise led to the conclusion that state laws concerning late-payment fees were preempted. Withholding deference for that reason, as

the NGA suggests, could profoundly affect the routine application of *Chevron*. Indeed, under the NGA's approach, *Chevron* would be inapplicable anytime an agency implements a statute that itself preempts state law—even when the agency acts within the core of its *Chevron* authority—because the agency's implementation affects the statute's preemptive reach. The Court rejected such an approach in *Smiley*, where it extended full *Chevron* deference to the agency's understanding of an ambiguous statutory term, notwithstanding that it necessarily affected the scope of federal preemption. The same conclusion should follow here with respect to the Comptroller's visitorial powers regulation.

II. THERE IS NO BASIS FOR DECLINING TO ACCORD *CHEVRON* DEFERENCE TO AN AGENCY PREEMPTION DETERMINATION IN THE CIRCUMSTANCES OF THIS CASE

Assuming *arguendo* that the Comptroller's regulation does more than implement the term "visitorial powers" and also independently determines the scope of federal preemption—such that *Smiley* no longer would fully control—the regulation nonetheless would remain entitled to *Chevron* deference. In that event, the regulation would not be one "whose sole purpose [were] to preempt state law rather than to implement a statutory command." *Watters*, 550 U.S. at 21 n.13. Nor would it "merely purport to declare the preemptive scope of [the] federal statute." Pet. Br. 52. Rather, the regulation still would interpret the statutory term "visitorial powers" and that interpretation still would bear directly on the

agency's exercise of its responsibilities. The fact that the regulation—by hypothesis—would also result in federal preemption would afford no ground for denying it *Chevron* treatment.

In a series of decisions both predating and postdating *Chevron*, the Court has established that deference fully applies to regulations adopting substantive rules and determining that those rules preempt state law. *See United States v. Shimer*, 367 U.S. 374 (1961); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *New York v. FCC*, 486 U.S. 57 (1988); *New York v. FERC*, 535 U.S. 1 (2002). The Court's decision in *New York v. FCC* is illustrative. There, the FCC, acting under its general rulemaking power, adopted regulations establishing signal strength standards for cable systems and also preempting local authorities from applying any more stringent standards. This Court accorded *Chevron* deference to, and sustained, the FCC's regulations, including their preemption of local standards. The Court explained that, when an agency is given a "broad grant of authority to reconcile conflicting policies," that authority applies "even in the area of preemption." 486 U.S. at 64.

Petitioner and the NGA do not discuss—much less come to terms with—that series of decisions. The various arguments raised by petitioner and the NGA for denying *Chevron* deference not only are contrary to those decisions, but they also are unpersuasive in any event.

A. The Reasons Offered By Petitioner And The NGA For Denying *Chevron* Deference Are Unsound

1. *No specific delegation of pre-emptive authority is necessary*

a. The central premise of the NGA's and petitioner's argument for denying *Chevron* deference when an agency preempts state law "on [its] own authority" is that an agency lacks authority to adopt a preemptive regulation unless Congress specifically delegates the authority to preempt state law. NGA Br. 4, 12; *see* Pet. Br. 53. That premise is flatly irreconcilable with this Court's decisions.

The Court directly addressed the matter in *New York v. FCC* in extending deference to the preemptive regulation at issue there. As the Court explained, a "pre-emptive regulation's force does not depend on express congressional authorization to displace state law," and a "narrow focus on Congress' intent to supersede state law" therefore "is misdirected." *New York v. FCC*, 486 U.S. at 64 (quoting *de la Cuesta*, 458 U.S. at 154). Rather, "[i]f the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,'" the regulation should be sustained unless "the accommodation is not one that Congress would have sanctioned." *Id.* (quoting *Shimer*, 367 U.S. at 383); *compare Chevron*, 467 U.S. at 845 (applying same standard).

The Court in *de la Cuesta* accordingly affirmed a preemptive regulation promulgated pursuant to a

general grant of authority to prescribe "'rules and regulations . . . for the organization, incorporation, examination, operation, and regulation of [Federal Savings and Loan Associations].'" 458 U.S. at 145 (quoting 12 U.S.C. § 1464(a) (1976 ed., Supp. IV)); *see id.* at 170. Here, similarly, the Comptroller possesses general authority to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93(a). That general grant of authority, under this Court's decisions, fully encompasses the authority to promulgate preemptive regulations commanding *Chevron* deference.

b. Petitioner errs in contending (Pet. Br. 45-46) that the "presumption against preemption" requires conditioning an agency's ability to promulgate preemptive regulations on a specific grant of authority to preempt state law. The Court rejected precisely that argument in *New York v. FERC, supra.* The Court explained that the determination whether "a federal agency may pre-empt state law" "does not involve a presumption against pre-emption." 535 U.S. at 18. Rather, the proper focus of the inquiry, as set forth in *de la Cuesta* and *New York v. FCC*, is whether the agency has acted within its delegated authority. *Id.* And because the statute at issue in *New York v. FERC* "unambiguously authorize[d] FERC to assert jurisdiction over" the activities encompassed by its preemptive regulation, the Court upheld the agency's election to preempt state law. *Id.* at 19-20.[3]

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[3] No presumption against preemption applies in the context of the National Bank Act in any event. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (explaining that "grants of both enumerated and incidental 'powers' to

2. *Agencies are well equipped to make policy judgments concerning preemption of state law*

The fundamental reason that an agency's preemptive regulation requires no specific grant of preemptive authority is that an agency's determination that preemption is warranted—like all other agency determinations residing within the core of its *Chevron* authority—is at root a *policy* judgment. *Chevron* rests on the insight that an ambiguous statutory term involves an "implicit" delegation of authority to choose an interpretation that best promotes the statute's policies. *See Chevron*, 467 U.S. at 844. The decision therefore speaks in terms of whether the agency's "choice represents a reasonable accommodation of conflicting *policies* that were committed to the agency's care by the statute." *Id.* at 845 (emphasis added) (quoting *Shimer*, 367 U.S. at 382).

The decision whether displacement of state law is warranted in furtherance of a federal statute, and if so to what extent, is just such a policy judgment. *See New York v. FCC*, 486 U.S. at 64 (explaining that "choice to pre-empt" warrants deference "if it "represents a reasonable accommodation of conflicting policies . . . committed to the agency's care"). As with other policy judgments, the decision whether to preempt state law implicates the agency's expertise concerning "the relevant history and background" of the statute and subject matter. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (discussing pre-

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national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law").

emption). While policy judgments about preemption involve considerations of federalism, *see* NGA Br. 15-17; Pet. Br. 19, that in no way calls into question an agency's capacity to make them. Indeed, the opposite is true. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) ("agency is uniquely qualified to determine whether a particular form of state law stands as obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (internal quotation marks omitted); *id.* at 506 (Breyer, J., concurring) (agency has "special understanding of . . . whether (or the extent to which) state requirements may interfere with federal objectives").

For instance, agencies are well-versed in, *inter alia*, the varying details of the potentially fifty different state regulatory schemes bearing on the subject; the nature, frequency, and breadth of their application; the state of empirical research and data concerning the subject matter; the record of experience under different types of regulatory schemes; and the philosophical approach to regulation preferred by the Executive in office—all of which may be brought to bear on a decision whether to preempt. *See* NGA Br. 19 (noting that agencies are aided in their preemption decisions by their "ability to undertake wide-ranging investigations of industry structure[s] and similar variables" and a "capability of finding legislative facts that far surpasses courts").

Moreover, agencies have the resources to monitor the effect of federal regulation on state law in a way that Congress and the Courts may be less equipped to accomplish. *See Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985) ("Congress, unlike an agency, normally does not fol-

low, years after the enactment of federal legislation, the effects of external factors on the goals that the federal legislation sought to promote."). An agency therefore can translate its understanding of the interplay between federal and state requirements "into *particularized* preemptive intentions accompanying its various rules and regulations," *Medtronic*, 518 U.S. at 506 (1996) (Breyer, J., concurring) (emphasis added), rather than the broader strokes with which Congress often legislates. *Cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (noting that "legislators cannot foresee all eventualities"). In fact, agencies are required to adhere to Executive Order 13,132, which mandates that they "carefully assess the necessity" of "any action that would limit the policymaking discretion of the States," Exec. Order No. 13,132 § 3(a), 64 Fed. Reg. 43,255, 43,256 (Aug. 10, 1999), and that "regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated," *id.* § 3(d)(4), 4(c).[4]

An agency determination concerning preemption therefore involves far more than simply a traditional application of "legal" principles and precedents. *See* NGA Br. 13-14; Pet. Br. 50. And even if an agency engaged solely in a legal analysis when deciding whether to preempt state law, that would afford no reason to deny its decision deference. *See, e.g., Nw. Pipeline Corp. v. FERC*, 61 F.3d 1479, 1486 (10th

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[4] *See, e.g.*, 69 Fed. Reg. at 1,895 (detailing comments Comptroller received about the visitorial powers regulation from consumer groups, "a state bank supervisors' association," and "state bank supervisors' offices").

Cir. 1995) (noting that, in interpreting energy tariffs, "the Commission applies the same canons of contract construction as would a reviewing court"). *Chevron*, after all, "rejected the view that a court may freely review an agency on pure questions of law." *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987). Thus, this Court defers to an agency's exercise of discretion regardless "whether it involve[s] questions of law or fact." *Shimer*, 367 U.S. at 381-82; *see, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) (reversing decision in which court of appeals refused to defer to agency's interpretation "because of the 'statutory interpretation-jurisdictional' nature of the question at issue"); *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 n.7 (1984) (rejecting argument that "because 'the scope of the [statutory clause in question] is essentially a jurisdictional or legal question concerning the coverage of the Act,' we need not defer to the expertise of the Board") (quoting Br. for Resp., No. 82-960, at 13)).

3. *Regulations implicating the agency's jurisdiction are not excepted from* Chevron *deference*

The NGA and petitioner suggest that an agency's decision to preempt state law should be denied deference absent a specific grant of preemptive authority because the agency may act out of an incentive to "increas[e] [its] own regulatory power." Pet. Br. 50; *see* NGA Br. 17-18; Cong. Br. 17-25. As petitioner acknowledges (Pet. Br. 50), however, the "rule of deference applies to an agency's interpretation of a

statute designed to confine its authority." *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380 (1988) (Scalia, J., concurring).

That deference is not, as the NGA and petitioner suggest, afforded "presumably" (NGA Br. 18) or "largely" because "it may be difficult in some case[s] to distinguish[] between jurisdictional and non-jurisdictional issues." Pet. Br. 50. On the contrary, as the Court explained when it rejected a similar argument in *Schor*, 478 U.S. at 845, the Court defers to an agency's assessment of its jurisdiction because "[a]n agency's expertise is superior to that of a court when a dispute centers on whether a particular regulation is reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the Act the agency is charged with enforcing." The same is true in the context of preemption: an agency is likewise well positioned to determine whether the displacement of state law is reasonably necessary to achieve federal objectives.

4. *Neither the Supremacy Clause nor the Necessary and Proper Clause advances petitioner's and the NGA's argument*

The NGA errs in invoking the Supremacy Clause (Br. 7-10) in support of its argument that agencies lack *Chevron* authority to adopt preemptive regulations absent a specific delegation of authority to preempt state law. The Supremacy Clause provides that the "Judges in every State shall be bound" by federal law, U.S. Const. art. VI, cl. 2, not that "Judges" rather than agencies shall "resolv[e] conflicts between supreme federal law and the laws of

the States." NGA Br. 9. Any such conflict has already been resolved, in favor of federal law, by the Clause itself. Contrary to the NGA's suggestion (*see* Br. 13), moreover, a decision to preempt state law is not a judgment about the meaning of the Constitution; it is, as explained above, quintessentially a policy judgment concerning whether Congress's objectives can best be achieved in the absence of, or in addition to, state regulation.

The NGA fares no better in its reliance (Br. 11-13) on the Necessary and Proper Clause. The NGA submits that the Necessary and Proper Clause confirms Congress's power to delegate to agencies the authority to preempt state law. But nothing in the Necessary and Proper Clause suggests that Congress can *only* do so through a specific grant of preemptive authority as opposed to a general grant of authority to promulgate rules to carry out the agency's responsibilities.

B. The Decisions Relied On By Petitioner And The NGA Do Not Call Into Question The Applicability Of *Chevron* In This Case

Petitioner and the NGA rely on a number of this Court's decisions in arguing that the Comptroller's regulation is not entitled to *Chevron* deference. That reliance is misplaced.

1. To begin, the Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) neither sets forth a new standard of deference nor requires an explicit delegation of authority to preempt. *See* NGA Br. 24 (contemplating a "*Medtronic* standard"). The Court in that case concluded that the statute at issue did

not preempt state law—the same conclusion reached by the FDA in its regulations. 518 U.S. at 496-97 & n.16. The Court's independent agreement with the agency's interpretation of statutory limitations does not determine the proper level of deference owed an agency's decision to displace state law in order to effectuate the goals of an ambiguous federal statute.[5] As Justice Breyer affirmed in his concurrence, moreover, "in the absence of a clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possess a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect." *Id.* at 505 (Breyer, J., concurring).

2. The Court's decisions in *Gonzales v. Oregon*, 546 U.S. 243 (2006), *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), and *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), similarly fail to speak to the nature of delegation necessary for an agency to preempt of its own accord. The Court in *Gonzales* held that the Attorney General lacked implicit authority to issue certain rules when the authorizing act's "express limitations on the Attorney General's authority, and other indications from the statutory scheme, belie[d]" any claim to such power. 546 U.S. at 259-60. *Adams Fruit* is similarly inapposite. Because the statute in question unquestionably "established an enforcement scheme inde-

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[5] The same is true of the Court's decisions in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008), and *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 21 n.13 (2007). The Court declined to address the question of deference in both cases, because the Court found in each case that the statute itself resolved the preemption question.

pendent of the Executive," the Court refused to defer to the Department of Labor's determination of how that scheme should operate. 494 U.S. at 649-50. Likewise, in *Louisiana PSC*, the Court simply held that the FCC's preemption determination exceeded its authority under the statute, which explicitly denied the Commission the authority to regulate the pertinent subject—*viz.*, intrastate service. 476 U.S. at 369-70.

All three decisions thus stand for the proposition that the Court will not defer to an agency decision falling outside of its scope of delegated authority. That does not suggest, however, that specific delegation of preemptive authority is required when the statute is otherwise silent. On the contrary, the *Louisiana PSC* Court reaffirmed the rule that a federal agency may promulgate preemptive regulations "when and if it is acting within the scope of its congressionally delegated authority." *Id.* at 374; *see id.* at 369 (citing *Crisp* and *de la Cuesta*).

3. The Court's decision in *Wyeth v. Levine*, No. 06-1249, slip op. (Mar. 4, 2009), does not cite—much less purport to overrule—the decisions in *Shimer*, *Crisp*, *New York v. FCC*, and *New York v. FERC*, *supra*. Accordingly, *Wyeth* cannot be considered to call into question the long-settled understanding that an agency needs no specific delegation of preemptive authority in order to adopt a preemptive regulation. In addition, the agency's statement about preemption in *Wyeth* was made in a preamble and without notice-and-comment procedures, slip op. at 19, and the statement did not command *Chevron* deference, *id.* at 20 (citing, *inter alia*, *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). Indeed, the

Court made clear that it had "no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law." *Id.* at 24.

This case, by contrast, involves a "full-dress regulation" adopted "pursuant to the notice-and-comment procedures . . . designed to assure due deliberation." *Smiley*, 517 U.S. at 741. That regulation, for all the reasons explained, is fully entitled to *Chevron* deference.

CONCLUSION

For the foregoing reasons, as well as those stated by respondents, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE THE COMPTROLLER OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER ANDREW M. CUOMO

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STATEMENT OF INTEREST AS AMICUS CURIAE [1]

The interest of the Comptroller of the City of New York, William C. Thompson, Jr. (the "NYC Comptroller"), in this action arises from his statutory role as the independently elected Chief Fiscal Officer of the City of New York. *See* New York City Charter § 93 *et seq*. As such, his mission is to help ensure the financial health of the City of New York (the "City") by advising the Mayor, the City Council and the public of the City's financial condition. Charter § 93(a). The NYC Comptroller also makes "such recommendations, comments and criticisms in regard to the operations, fiscal policies and financial transactions of the city as [he] may deem advisable in the public interest." *Id.*

The NYC Comptroller's interest in this action also arises from his statutory role in the New York City Banking Development District ("BDD") Program. New York State Banking Law § 96-d created a Banking Development District Program for the purpose of establishing bank branches in geographic locations where there is a demonstrated need for banking services. Banking Law § 96-d, and related amendments to New York State General Municipal Law § 10, authorize municipalities to deposit funds at below-

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

market rates into bank branches located in a BDD, including branches of state or federally regulated saving banks and savings and loan institutions. The NYC Comptroller's statutory role in the City's BDD program arises under § 1524 of the New York City Charter, which authorizes the New York City Banking Commission, composed of the NYC Comptroller, the Mayor, and the Commissioner of Finance, to designate banks for the deposit of City funds. Such deposits of City funds include those under the BDD Program.

Pursuant to that statutory authorization, the NYC Comptroller and the other members of the New York City Banking Commission have together created 25 BDDs, with City deposits now totaling $200 million, in areas throughout the City of New York that did not have adequate banking services. To further ensure that City residents, both within the BDDs and elsewhere, receive adequate banking services, the NYC Comptroller has also instituted a Foreclosure Prevention Helpline Program, to assist New Yorkers whose homes are threatened with foreclosure.

The NYC Comptroller's role in the City's BDD Program, and data collected from the NYC Comptroller's Foreclosure Prevention Helpline Program, uniquely enable the NYC Comptroller to bring to the attention of the Court relevant matter, which has not already been brought to the attention of the Court by the parties, concerning banks' strikingly disparate and unequal treatment of African-American and Hispanic home mortgage borrowers in the City of New York.

SUMMARY OF ARGUMENT

As Petitioner properly notes in its Brief at pp. 46-47, "this case is not about banking regulations . . . It is about the protection of consumers, where States historically have taken the lead." In this regard, racial disparities reflected in the extensive data collected by the Office of the NYC Comptroller in connection with its Foreclosure Prevention Helpline, and other data from the subprime crisis, show the continuing need for State investigations and enforcement of national banks' compliance with mortgage lending laws. The data also leaves no doubt that the New York State Attorney General's thwarted 2005 investigation into the fact that "a significantly higher percentage of high-interest home mortgage loans are issued to African-American and Hispanic borrowers than to white borrowers," served a critical public policy need that was otherwise unmet. *See Clearing House Association, L.L.C. v. Cuomo*, 510 F.3d 105, 109 (2nd Cir. 2007); *Petitioner's Brief* at p. 12. With that need unmet, abusive subprime lending continued, and ruinous financial crises ensued.

Our recent data confirms that mortgage providers' treatment of African-Americans and Hispanics who were buying homes and refinancing mortgages in the City was indeed unfair and unequal. As illustrated on our detailed maps (Appendix), home mortgage foreclosures in New York City have primarily affected home borrowers in minority neighborhoods — *regardless of whether those minority borrowers are lower, middle or high- income earners.* Other recent maps and studies, from independent sources, confirm that in those same neighborhoods, African-Americans and Hispanics,

regardless of their income levels, had earlier been steered disproportionately to subprime mortgages or refinancings, and have also experienced a far greater rate of court foreclosure actions.

In light of the lasting damage to homeowners and to the nation caused by national banks' disparate subprime lending practices, there is a strong public policy need for state officials to be permitted to investigate national banks' compliance with state laws, especially given the candid admission by the Office of the Comptroller of the Currency ("OCC") that it does not even have any procedures for examining banks' compliance with state law. *Petitioner's Brief* at p. 36. The court below erred in granting deference, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to the OCC's promulgation of 12 C.F.R. § 7.4000, which interpreted 12 U.S.C. § 484(a) to bar state investigations into state law violations of nationwide banks. Accordingly, the decision below should be reversed.

ARGUMENT

I. The NYC Comptroller's Data Shows Lenders' Disparate and Unfavorable Treatment of African-American and Hispanic Home Mortgage Borrowers in the City of New York

In the City of New York, African-American and Hispanic home buyers and owners, at all income levels, have been the victims of disparate and unequal treatment by home mortgage lenders, including national banks and their affiliates. African-American and Hispanic borrowers have, in particular, been subject to a highly disproportionate number of foreclosure proceedings in New York City. That high number of foreclosures came after lenders had steered minority borrowers, regardless of income level, to subprime mortgages. That racial disparity was the very subject of the New York State Attorney General's 2005 investigation that the Respondents blocked with respect to national banks, by means of this court action. New York has therefore been barred from investigating national banks' possible violations of its ban on discriminatory practices, found in NYS Executive Law § 296-a.

After two more years of unchecked subprime lending, the subprime crisis, and then a national and worldwide financial crisis, followed. Earlier scrutiny, exposure and correction of national banks' abusive subprime lending practices, such as unequal treatment of minority borrowers, might have lessened those crises. For that reason, it is vital that Petitioner and other state regulators be permitted to investigate the home lending practices and other state law compliance of national

banks, and that 12 U.S.C. §484(a) and other laws not be interpreted to bar such investigations.

The NYC Comptroller's Office has its own data on the impact of racially disparate home mortgage lending. Under the Office's Foreclosure Helpline Program, the NYC Comptroller's Community Action Center ("CAC") collects relevant information from homeowners, informs them of their options for addressing their foreclosure problems, puts them in contact with bank representatives who could work with them toward a resolution of their mortgage and foreclosure issues, and at times also contacts the banks to assist those homeowners. To date, the NYC Comptroller's Office has responded to over four thousand homeowner inquiries to the Foreclosure Prevention Helpline, many relating to mortgages originated or held by federally regulated banks. As a product of the homeowner inquiries, the CAC, in order to facilitate follow-up with borrowers, state and federally regulated lenders, and third-party counseling agencies, has created individual case files. Those CAC case files are the source of the data used to create the maps that are Figures 1 and 2 in the Appendix to this brief.

As shown on those maps, the data collected by the NYC Comptroller's Office in the past two years could not be more striking in showing the disparate and unequal treatment of African-American and Hispanic home mortgage borrowers in the City. To create those maps, two different maps were first produced using New York City 2000 census data, one based on income data and one based on minority population data. Small red circles ("foreclosure markers"), representing every

address from the NYC Comptroller's CAC Foreclosure Prevention case files as of June 30, 2008, of each of nearly one thousand homeowners facing mortgage foreclosure, were then overlaid upon the two different maps.

On the first map, "CAC Foreclosure Prevention Cases in New York City, by Income Level of Neighborhood" (Appendix, Figure 1), the foreclosure markers are overlaid upon a map of New York City census tracts by income level. On that first map, while there are some clusters of foreclosure markers, the overall arrangement of the markers seems to be random. The foreclosure markers show little or no pattern with respect to whether they are found in low, middle or high-income neighborhoods.

On the second map, "CAC Foreclosure Prevention Cases in New York City, by Racial Composition of Neighborhood" (Appendix, Figure 2), where the foreclosure markers are overlaid upon a map of NYC census tracts by minority population, the pattern is clear and unmistakable: The foreclosure markers are all found almost entirely in those neighborhoods – whether low, middle or high-income – with the highest percentages of African-American or Hispanic residents.

That compelling insight from the CAC data is underscored by a detailed map reflecting all foreclosures filed in New York City during 2006 (Appendix, Figure 3, lower image), that the Neighborhood Economic Development Advocacy Project ("NEDAP") created using New York City 2000 census data and federal Home Mortgage Disclosure Act ("HMDA") data; the HMDA

data is the same source that Petitioner relied upon in framing its investigation. *Petitioner's Brief* at p. 12. That map shows a pattern of home foreclosures, concentrated in New York City's non-white neighborhoods, nearly identical to the pattern on the maps of CAC data on Figures 1 and 2.[2]

The subprime foreclosure crisis in New York City is, therefore, not a matter of low-income minority home purchasers, or of low-income homeowners of all races, failing to pay their bills. Rather, it is a story of African-American and Hispanic homebuyers, being subject to foreclosure, regardless of income — while other homeowners, at comparable levels of income, are not.

This starkly disparate outcome appears to result from the exact issue that Petitioner had attempted to investigate before being enjoined: that "a significantly higher percentage of high-interest home mortgage loans are issued to African-American and Hispanic borrowers than to white borrowers." 510 F. 3d at 109. Such a correlation is shown by reliable independent studies. The second of the NEDAP maps (Appendix, Figure 3, upper image) shows precisely such a correlation in New York City between percentage of minority population and high-cost (*i.e.*, subprime) home refinance loans, as of 2005. As can be seen by comparing the locations of the high cost refinance loans with the map of New York City income levels in Figure 1, the locations of those

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2. The NEDAP map was published in the *New York Times Editorial Blog*, October 26, 2007, in the posting "Foreclosures in Black and White," at *http://theboard.blogs.nytimes.com/2007/10/26/foreclosures-in-black-and-white*.

subprime loans correlate directly with the minority composition of the homeowners' neighborhoods, and not with their incomes.

Similarly, as noted in a 2008 report by New York University's Furman Center for Real Estate & Urban Policy:

> • Blacks are four times as likely to receive a subprime home purchase loan as whites, and Hispanics are three times as likely as whites
>
> • In 2006, black homeowners (though making up only 20% of all homeowner households in the City) received 50% of all subprime refinance loans.

"Risky Lending Patterns and Increasing Foreclosure Filings Pose Significant Threats to Many NYC Neighborhoods," April 24, 2008, at *http://furmancenter.org/files/FurmanCenterStateoftheCity Release2007.pdf. See also* "Racial Disparity Found Among New Yorkers With High-Rate Mortgages," *New York Times*, October 12, 2007.

In sum, even as Respondents invoked 12 C.F.R. § 7.4000 to persuade the lower courts to enjoin state officials' investigations into national banks' racially-disparate subprime lending practices, those lenders continued to steer African-American and Hispanic home buyers and owners in all income groups into subprime loans, which has culminated, within the City of New York, in disproportionately high rates of foreclosure for such minority homeowners. The ruinous aftermath, in

the City and nationwide, of the courses of action undertaken by mortgage lenders during the subprime "boom" highlights the compelling need for state authorities, intimately familiar with local housing and lending markets and conditions, to be permitted to investigate national bank lenders' compliance with state law.

II. In Light of the Racial Disparities in Mortgage Lending, and the Inapplicability Here of *Chevron* Deference, the Decision Below Should Be Reversed

Petitioner has ably demonstrated in its brief that nothing in the legislative history of any banking statutes, nor in this Court's interpretations of those statutes, indicates that Congress ever intended to authorize the OCC to exercise any discretion to bar State officials from investigating national banks' violations of state law. *Petitioner's Brief* at pp. 6-9. As such, there is no basis for deference, under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984), to the OCC's 2004 promulgation of 12 C.F.R. § 7.4000, which first imposed that bar. Such an absence of deference to the OCC, particularly when coupled with the harms that have followed from that regulation's blocking of state investigations, should suffice to result in the reversal of the decision below.

The NYC Comptroller notes further that based upon the facts adduced in this amicus brief, and the arguments in Petitioner's Brief, there is one more basis for denying *Chevron* deference as to 12 C.F.R. § 7.4000. Racial disparities, such as the sharply disparate impacts of subprime lending demonstrated in this brief, have been a uniquely painful and controversial issue

throughout American history, the subject of Congressional legislation for decades, and the subject of Constitutional enactments since the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments. It is inconceivable, particularly in light of the complete Congressional silence on such a delegation, that the OCC could claim that any Congressional enactment authorized it to promulgate a regulation to bar State officials from investigating violations of anti-discrimination laws, such as New York State's Executive Law § 296-a.

Under the precedents of this Court, the silence of Congress on the delegation to the OCC of authority over such a uniquely controversial issue is another firm basis for denying *Chevron* deference to the OCC's rulemaking here. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (in light of tobacco's "unique" historical, social and political status, and absence of clear evidence of Congressional intent to delegate regulation to FDA, no *Chevron* deference given to FDA's tobacco regulation); *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006) (No deference given to U.S. Attorney General's regulation on assisted suicide: "The importance of the issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country . . . makes the oblique form of the claimed delegation all the more suspect"; citation omitted). For that reason, too, *Chevron* deference is unwarranted here.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

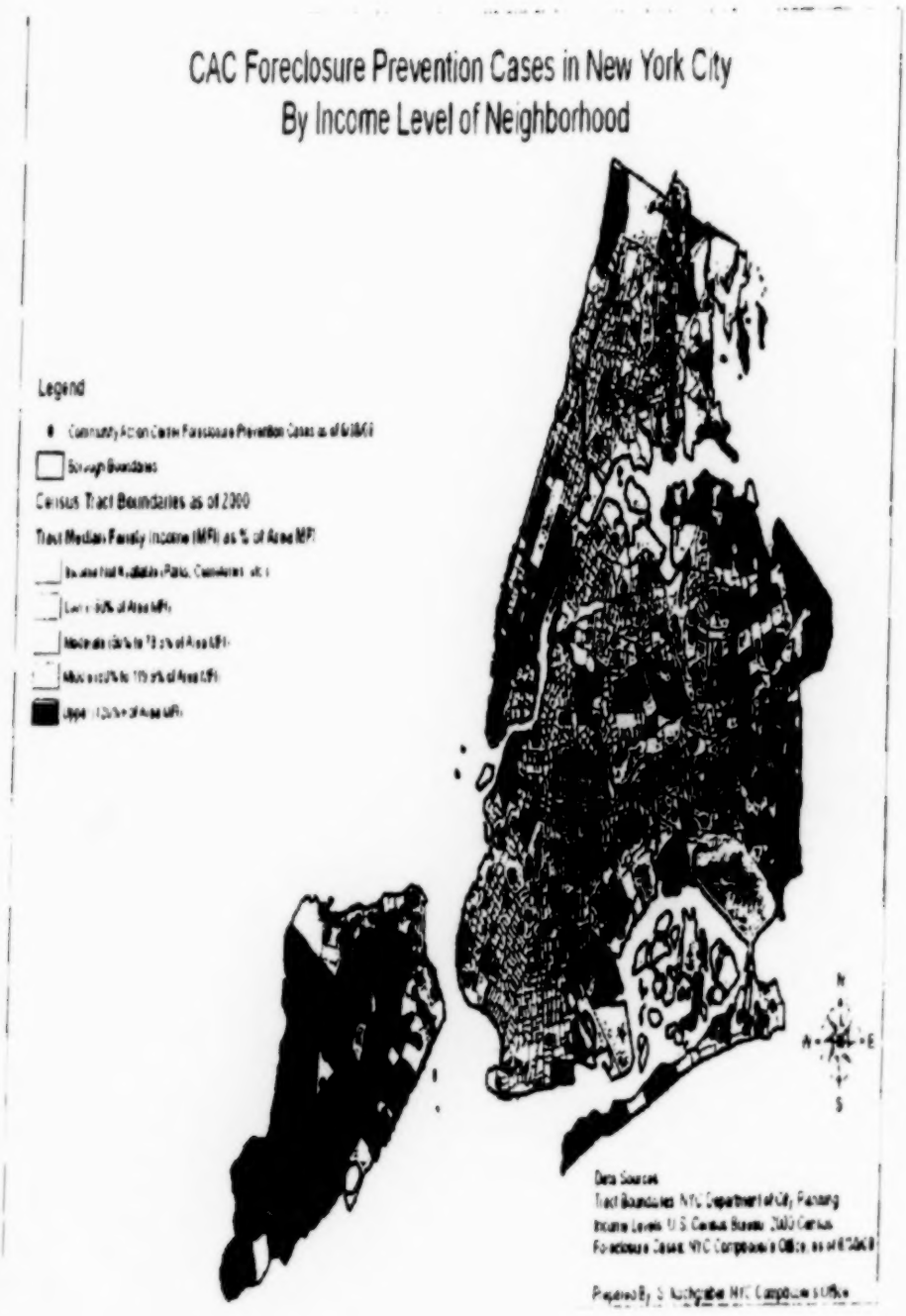

FIGURE 1

1a

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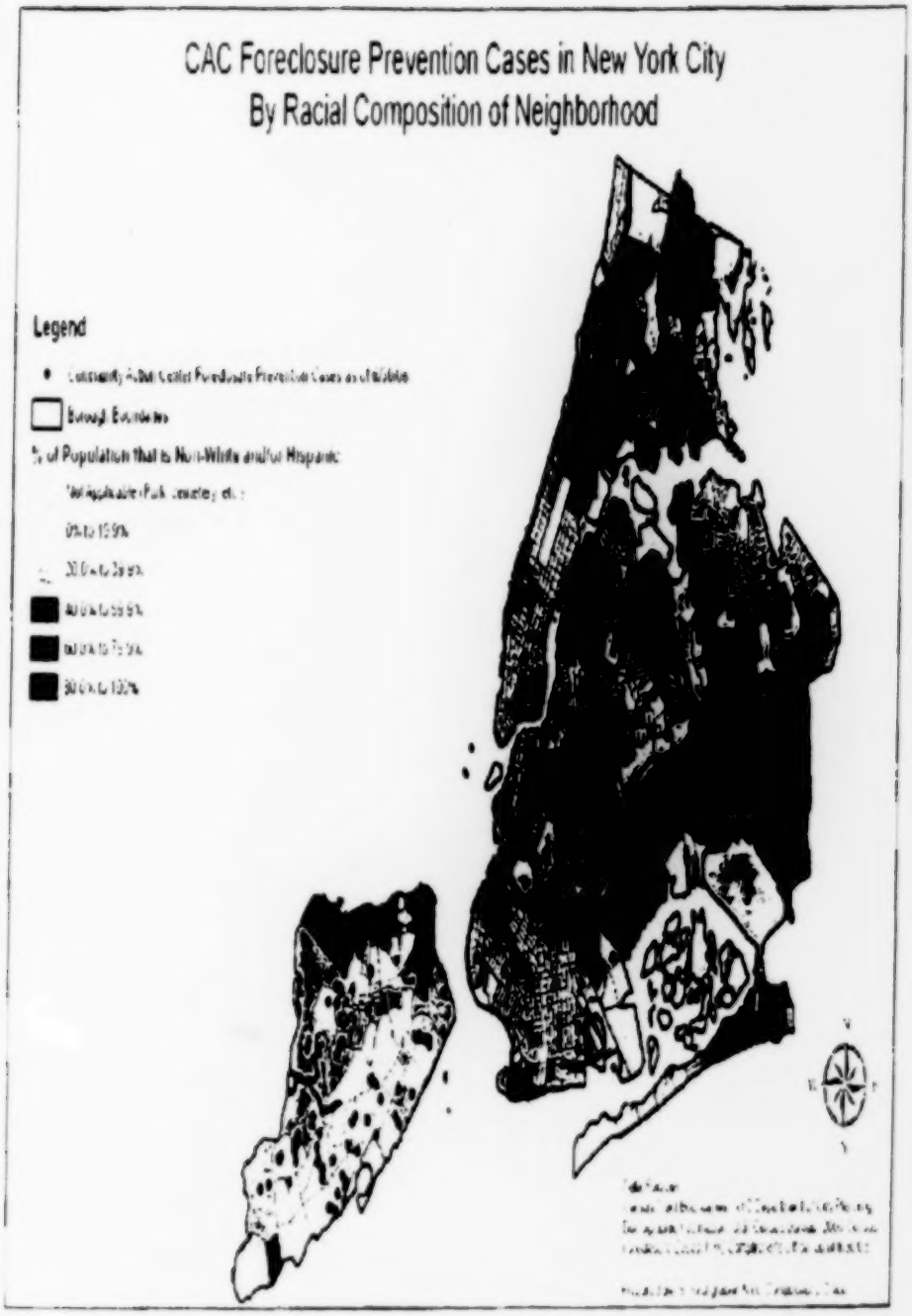
CAC Foreclosure Prevention Cases in New York City
By Racial Composition of Neighborhood
Legend

FIGURE 2

FIGURE 3

New York City

HIGH-COST REFINANCE LOANS MADE - 2005

FORECLOSURE PATTERNS - 2006

NEDAP

AMICUS CURIAE BRIEF

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MAR 4 - 2009
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SUPREME COURT, U.S.

No. 08-453

In The Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,
v.
THE CLEARING HOUSE ASSOCIATION, L.L.C. AND OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Statement of Interest*

The Conference of State Bank Supervisors (CSBS) is the national association of officials responsible for regulating state-chartered banks and other state-licensed financial services providers. Since its founding in 1902, CSBS has worked to facilitate exchange of information and technical expertise among state regulators, promote policy development and cooperation on interstate issues, improve coordination between federal and State regulators, and enable States and their officials to be heard on matters of national banking policy.

At the core of the CSBS mission is preserving and strengthening the Nation's dual banking system and the policy of competitive equality it reflects. As Congress and this Court have recognized, the state banking system serves an important and distinctive role and has a long record of responsiveness to diverse community needs and of financial, regulatory, and consumer protection innovation. State-chartered institutions pioneered the use of checking accounts and developed the first automated teller machines (ATMs) and interstate electronic funds transfer systems. And the state banking system led the way in protecting consumers: it originated deposit insurance and reserve requirements.

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*No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

This case and the issues it raises are of utmost importance to CSBS and mission. Although CSBS and its members have worked constructively with federal regulators, including the Office of the Comptroller of Currency (OCC) on regulatory and policy matters, CSBS has expressed deep concern about increasingly aggressive efforts by the OCC to, among other things, deploy its regulatory powers to shelter national banks from consumer protection and fair lending obligations.

In rulemaking comments on the regulation at issue here, CSBS urged the Comptroller to change course, explaining that the regulation would exceed his lawful authority and threaten the dual banking system, and expressed concern that it would have adverse consequences for consumers and homeowners, their communities, the financial system, and the broader economy. Those same considerations bear on this Court's review, and CSBS submits this brief in the hope the Court will keep the OCC within proper, lawful bounds.

Introduction And Summary

The decision below affirmed a judgment, issued at the behest of a federal official, permanently enjoining "[t]he Attorney General for the State of New York, and all those acting under his direction or in concert with him * * * from [*inter alia*] * * * instituting actions in the courts of justice against national banks to enforce state fair lending laws." 396 F. Supp. 2d 383, 407-408.

That judgment was not grounded on a conclusion that Congress had displaced New York antidiscrimination law, either generally or as applied to federally-chartered banks, or that Congress had authorized the federal agency do so. On the contrary,

it is conceded by all that the laws at issue are in effect and enforceable against national banks. Nor, for that matter, was there any finding that exclusive federal enforcement was mandated. The Comptroller agreed that private parties could enforce these same laws against national banks. See 510 F.3d at 120 n.9.

Rather, the judgment rested exclusively on a 2004 OCC regulation, see 12 C.F.R. § 7.400, and on courts' general obligation to accept permissible and reasonable agency interpretations. See *Chevron USA, Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Specifically, the regulation interpreted the National Bank Act prohibition on "visitation" of federally-chartered banks, 12 U.S.C. § 484(a), to mean that valid, non-preempted fair lending, consumer protection and other laws of the 50 States could be enforced by the OCC and by private parties – but not by those holding office under the States that enacted them.

Together, the regime announced by the OCC and the decisions sustaining it represent a startling example of what is not meant to occur under our federal system. Were the Court to sustain the regulation, power to enforce valid, democratically-enacted state laws concerning matters of surpassing local interest will have passed from the officials vested by the States with enforcement responsibility – who have the energy, expertise, and resources to enforce local laws – to a federal official whose primary responsibilities are far removed from the consumer protection field; who is even more insulated from political accountability than other Executive Branch officials; whose powers are often exercised confidentially. New York's (and every other State's) role in executing its own laws is reduced to that of a

federal supplicant, and New York citizens dissatisfied with the enforcement of their laws will have scant means of assigning responsibility, let alone acting on their views.

The regime is, if anything, worse in practical reality than from the perspective of political theory. Whereas hundreds of officials with expertise at the state level stand ready to enforce compliance with consumer protection and antidiscrimination laws, there are now only a handful of federal employees. The federal agency depends on the regulated banks, not Congress, for almost its entire budget; its authority over them depends on their voluntary choice; and it has used – and unapologetically defended – its claimed power to displace state laws as a weapon in competition against other chartering authorities for banks' allegiance.

The state laws involved include many enacted in response to egregious acts of financial predation and commercial discrimination that had reached crisis levels in the States that passed them – behavior that has since played a significant part in plunging the national economy into its present, dire condition.

The court of appeals decision sustaining that asserted authority is startling in its own right. In treating the regulation as a typical exercise in gap-filling, the panel majority denied that special rules grounded in state sovereignty and safeguarding the state-federal balance were even *implicated* by the Comptroller's assigning to himself New York State's (and every other's) power to control the enforcement of its own laws. The decision treated the authority asserted as if it were a "lesser" incident of the "greater," constitutionally orthodox one to preempt state law, and seemed to regard the fact that the

displacement was effected by regulation rather than statute as grounds for less vigilant judicial review. The court then pronounced the regulation valid, on the ground the statutory language was "ambiguous" and Congress had not clearly precluded the Comptroller's assertion.

The majority below misunderstood the Constitution and this Court's precedents. Had Congress legislated the regime just described, it would raise serious constitutional concerns. The Constitution grants the federal government broad powers, but it requires they be exercised in a manner that respects State sovereignty; a statute that placed in the hands of a federal administrator decisions as to when and how important (non-preempted) state laws would be enforced would transgress basic principles of our federal system.

Moreover, a court presented a claim that a federal statute sanctioned such a regime would strain to seek a less troubling construction and, at the very least, require the party advancing that peculiar interpretation to identify a clear indication that Congress had considered and affirmatively intended so dramatic a change in the federal-state balance.

But the regime upheld here is not claimed to derive from a congressional judgment, let alone a plainly expressed one. Rather, it rests on an administrative *regulation* purporting to reinterpret allegedly ambiguous language. Although the proper rule for such cases may defy sound-bite distillation, the logic of this Court's precedents – and the principles of federalism and separation of powers on which they rest – require *more* searching review of assertions of regulatory preemption, including OCC assertions

concerning the preemptive reach of the National Bank Act. A legal regime that relies on the structure and processes of *congressional* lawmaking as the prime safeguard for States' interests cannot permit an agency shortcut.

Although it is especially important that the Court vindicate basic federalism principles here, the regulation itself is so extreme and irrational that it would not survive deferential *Chevron* review. Leaving aside the implausibility of Congress's conferring the extraordinary authority asserted in the obscure and indirect way OCC proposes, the claim that the regulation rests on a permissible reading of ambiguous statutory text fails by its own terms. Nothing in Congress's language hints at the enforcement preemption "interpretation" OCC imposes. On the contrary, both the ordinary, long-settled understanding of "visitation" and a venerable decision of this Court foreclose the notion that § 484(a) creates a class of state laws that are valid and non-preempted – but nonetheless unenforceable by the states themselves.

Indeed, the regulation would fail even minimal reasonableness review: as the majority opinion below recognized, OCC's rulemaking focused entirely on defending the agency's *power* to interpret the provision in the fashion claimed, without any effort to explain why Congress would have authorized the strange enforcement regime – or even why *the OCC* believed it advantageous. In fact, even the shibboleths of "uniform law" and "unitary regulation" the Comptroller reliably invokes in asserting preemptive power provide no shelter for the worst-of-both-worlds enforcement regime the regulation announces, in which authority to enforce a State's laws is wielded by

private parties and federal bank regulators – *i.e.*, *everyone but* the officials the State vested with law enforcement responsibility.

ARGUMENT

As we explain below (and petitioners demonstrate comprehensively), the visitation prohibition could not be given the meaning the Comptroller seeks to impose, even under the forgiving *Chevron* standard, and nothing more need be decided to reverse the judgment and set aside the regulation. As in *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), no especially stringent standard of review is required to reject "the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Id.* at 274.

But to acknowledge that clear statement rules are not needed is not to deny their importance. The lower courts' treatment of this case as a routine challenge to ordinary administrative gap-filling – and failure to perceive that the federalism-respecting rules of construction even were *implicated* – are as startling as the underlying claim of Executive power sustained. Indeed, the decision below fits into a broader pattern of increasingly implausible and aggressive assertions of OCC power to displace state law (or law enforcement) and of increasingly permissive judicial review.

This Court must make clear that principles of federalism – and rules requiring judicial enforcement of them – are plainly and directly applicable in these cases and that judicial intervention is *especially* needed when the departure from the Constitution's allocation

of authority emanates from an Executive Branch agency, not Congress.

I. The Authority Asserted In The Comptroller's Regulation Has No Place Under Our Federal Constitution

The "great innovation" of our constitutional design – that "'our citizens would have two political capacities, one state and one federal,'" – is itself a "protection[] * * * of liberty," *Printz* v. *United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J, concurring). The constitutional design "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991).

The dual banking system exhibits these virtues. Although those who first enacted the National Banking Act in 1863 expected that state-chartered institutions would wither away – and imposed punitive, discriminatory taxes to hasten the job, state banking withstood this assault, and in the twentieth century, Congress came to recognize that the Nation was better served by a system that preserved the benefits of experimentation and political accountability; was responsive to diverse community needs and values; and provided a safeguard against unchecked, centralized authority. Major federal statutes reflect congressional commitment to the policy of "competitive equality," *First Nat. Bank in Plant City* v. *Dickinson*, 396 U.S.

122, 133, (1969) (describing policy as "firmly embedded in the statutes governing the national banking system"), as do recently enacted financial reform proposals, see Pub. L. No. 110-289 § 1502 (2008) (encouraging "the States, through the Conference of State Bank Supervisors * * * to establish a Nationwide Mortgage Licensing System and Registry").

But federalism is not the law *because* of its benefits, but rather because the Constitution is binding, and it recognizes State sovereignty. Accordingly, when structural safeguards intended to protect the States and inhibit unconstitutional lawmaking do fail, the federal judiciary has an important, independent obligation to enforce the Constitution. See *New York* v. *United States*, 505 U.S. 144, 157 (1992) ("Our task would be the same even if one could prove that federalism secured no advantages to anyone").

As part of this responsibility, this Court has articulated a series of distinct, but overlapping rules for interpreting "[f]ederal statutes impinging upon important state interests," *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). First, laws should be construed so as to "avoid significant constitutional and federalism questions," *Solid Waste Agency* v. *United States Army Corps of Eng'rs* , 531 U.S. 159, 160-61 (2001) (*SWANCC*). Second, the party advocating an interpretation that would disturb the federal balance must point to a clear statement establishing that Congress "ha[d] in fact faced" the federalism consequences, *United States* v. *Bass*, 404 U.S. 336, 349 (1971), and intended them. Courts must likewise apply a general presumption that Congress does not intend to preempt state law, unless that purpose is

"clear and manifest," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *United States* v. *Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (describing preemption doctrine as example of "this Court's * * * participat[ion] in maintaining the federal balance"); *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

Moreover, as the volume and sweep of Executive Branch lawmaking has grown, see *American Trucking Associations, Inc.* v. *Whitman*, 531 U.S. 457 (2001), the Court has recognized that these federalism-reinforcing rules must be applied with "heightened" vigilance when authority for the balance-disrupting result is claimed to derive from a regulation, rather than an Act of Congress. See *SWANCC*, 531 U.S. at 172-73.

The Second Circuit majority did not analyze these principles in depth – acknowledging them only long enough to conclude that they posed no barrier to application of *Chevron* deference. That conclusion reflects a drastic underestimation of the significant federalism questions presented. There is no suggestion in the majority opinion that Congress considered, let alone affirmatively intended or expressly directed, the enforcement regime OCC seeks to establish.

A. The Incursion On State Sovereignty Would Raise Serious Constitutional Questions – Even If it had been Enacted by Congress

The majority below appears to have treated the *SWANCC* principle as speaking only to cases where the constitutional question involves "'the outer limits of [one of] Congress' power[s],'" 510 F.3d at 114 (quoting 531 U.S. at 172); *id.* (noting that national bank regulation "has been 'substantially occupied by federal

authority for an extended period of time'") (quoting *Wachovia Bank, N.A.* v. *Burke,* 414 F.3d 305, 314 (2d Cir. 2005)). To be sure, the particular constitutional doubts raised in *SWANCC* involved the boundary between the legislative jurisdiction conferred on Congress by the Commerce Clause and that which the Tenth Amendment reserves to the States. See *Lopez,* 514 U.S. at 553.

But distinct from its concern for States' regulatory domain, the Constitution requires that federal law "treat the States *in a manner* consistent with their status as residuary sovereigns," *Alden* v. *Maine,* 527 U.S. 706, 748 (1999) (emphasis added). See *New York,* 505 U.S. at 187 ("Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form"); cf. *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.,* 506 U.S. 139, 146 (1993).

The power asserted by the Comptroller works a plain and direct infringement on State sovereignty. States' authority to enforce their laws "derive[s] from separate and independent sources of power * * * originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment." *Heath* v. *Alabama,* 474 U.S. 82, 89 (1985); accord *Diamond* v. *Charles,* 476 U.S. 54, 65 (1986) (describing "the power to create and enforce a legal code, both civil and criminal" as "one of the quintessential functions of a State") (citation and internal quotation marks omitted).

Nor may these statements be read as merely stating the truism that enforcement is needed to make law-making powers meaningful, see *McClesky* v. *Zant,*

499 U.S. 467, 491 (1991) ("the power of a State to pass laws means little if the State cannot enforce them"). On the contrary, it is clear that a State's power over enforcement of its own law is a significant and independent component of its sovereign status. In *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924) – a decision of singular pertinence here, see p. 34, *infra* – the Court specifically recognized that when "the sanction behind [a law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *Id.* at 660.

Indeed, this Court's classic description of the Constitution's system of dual sovereignty reads like a bill of particulars against the OCC regulation here:

> In their laws, and mode of enforcement, neither [order of government] is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers – are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Tarble's Case, 80 U.S. 397, 407 (1872).

The effect of the OCC Regulation is to convert the States from enforcers of their own laws to federal petitioners, who must depend on the federal regulator to take action. It reassigns the enforcement of New York law (and every other State's) from those sworn, and politically bound, to enforce it, to federal officials for whom compliance with state law is likely to be, at best, a secondary concern. Compare N.Y. Const., art.

XIII, § 1 (oath to protect state constitution) with 5 U.S.C. § 3331 (oath to protect federal Constitution); 12 U.S.C. § 3.

A regime that turns the States into supplicants, dependent on a federal agency for enforcement of their own laws, is no more tolerable under the Constitution than one that treats them as "mere departments of the National Government." *FERC v. Mississippi*, 456 U.S. 742, 795 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part). "An essential attribute of the States' retained sovereignty [is] that they remain independent and autonomous within their proper sphere of authority," *Printz*, 521 U.S. at 928.

As these decisions recognize, the powers denied under the OCC Regulation – to decide how and against whom its laws will be enforced – are each part of "how a State defines itself as a sovereign." *Gregory*, 501 U.S. at 461. See *Alden*, 527 U.S. at 751 ("If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State"); *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266, 268 (5th Cir.1976) ("The office of [State] attorney general is older than the United States * * * [H]e typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest"); *id.* n.6 (noting nearly universal practice of making office elective); *Younger* v. *Harris*, 401 U.S. 37, 45 (1971) ("Ordinarily, there should be no interference with [state prosecutors]; primarily, they are charged with the duty of prosecuting offenders

against the laws of the state, and must decide when and how this is to be done") (citation omitted).

A State "has both the right and the authority to select the methods to be used in effectuating its goals." *Sheehy* v. *Big Flats Community Day* , 73 N.Y.2d 629, 634-35 (1989). Its decisions as to how to enforce its law – including the role to provide private enforcement, *Hawaii Medical Ass'n* v. *Hawaii Medical Service Ass'n, Inc.*, 148 P.3d 1179, 1211 (Haw. 2006); the extent of governmental control of litigation, *Consumer Advocacy Group, Inc.* v. *Kintetsu Enterprises*, 150 Cal.App.4th 953, 963 (Cal. App. 2007); the amount of public resources devoted to enforcement, *Olstad* v. *Microsoft Corp.*, 700 N.W.2d 139, 153 (Wisc. 2005); the distribution of decisional authority between administrative and judicial fora, *Case of Dalbec*, 867 N.E.2d 792, 797 (Mass. App. 2007); the amount of sanctions, *State* v. *Irving Oil Corp* ., 955 A.2d 1098, 1107 (Vt. 2008); the applicable limitations period, *Avis* v. *Bd. of Review,* 837 P.2d 584 (Utah Ct. App. 1992), and liability for attorney's fees, *Cogar* v. *Monmouth Toyota*, 751 A.2d 599, 607 (N.J. App. 2000) – are each vital aspects of self-government.

Indeed, the OCC's regime is all the more strange and troubling because it denies power to enforce law *only* to officers primarily vested with that authority – and directly accountable on that basis to the State's citizens. New York's and other States' decisions to provide a private right of action are unaffected. See 510 F.3d at 120 n.9 ("the parties do not dispute that private parties would remain free under the OCC's regulation to bring individual or, where appropriate, class actions against national banks to enforce

compliance with non-preempted state laws, regardless of the subject matter such laws concern").

This enforcement regime, of course is not the one New York (or any State) chose; government enforcement is often necessary to make a right practically effective, see, *e.g.*, *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 326 (1980). It amounts to a complete inversion of ordinary rules, which regard private litigants as distinctly less reliable expositors of the public interest than government officials. See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) (preemption of state agency regulation, but not state law tort suits, "would grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative law-making processes"); cf. *Porter* v. *Warner Holding Co.* , 328 U.S. 395, 397 (1946). As *Alden* explained, with respect to suits by the United States, "[a] suit which is commenced and prosecuted * * * in the name of the [government] by those who are entrusted with the constitutional duty to [enforce the law]* * * differs in kind from the suit of an individual * * * * Suits brought by the [government] itself require the exercise of political responsibility," 527 U.S. at 755. See also *Massachusetts* v. *EPA*, 549 U.S. 497, 518 (2007) ("It is of considerable relevance that the party seeking review here is a sovereign State and not * * * a private individual").

Nor is the Second Circuit majority's related assumption – that divesting States of enforcement power should be treated as a "lesser" intrusion than the "greater" power to preempt their laws entirely – constitutionally valid. See 510 F.3d at 120 (describing

regulation as "preserv[ing] state sovereignty by * * * not preempting state laws").

To begin, the premise that the supposedly "greater power" is even available here is mistaken: the state laws in issue are ones even *the Comptroller* has acknowledged Congress did not intend to preempt. And it was a serious mistake to use decisions sustaining OCC's assertions of administrative preemption as the standard against which to measure other, ostensibly lesser incursions on States' powers. See *id.* at 113 (discussing *Wachovia* v. *Burke*).

Moreover, unlike in the preemption cases most directly provided for under the Constitution, the federal power here is directed *only* against States (and those holding office under them). See *Alden*, 527 U.S. at 714 (noting "the founding generation's rejection of 'the concept of a central government that would act upon and through the States * * * '") (quoting *Printz*, 521 U.S. at 919).[1]

Indeed, this Court in *New York* rejected a fundamentally similar "greater-power-includes-the-lesser" argument – *i.e.*, that a regime that preserved *some* role for the State was inherently less offensive to the Tenth Amendment than would one where Congress acted preemptively. In the latter case, the Court explained, "it is the Federal Government that makes the decision in full view of the public, and it will be

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[1]To be sure, federal preemption is sometimes *effected* through suits enjoining attorneys general, see *Ex Parte Young*, 209 U.S. 123 (1908), but such suits are an incident of the conclusion that the state *law* is, by operation of the Supremacy Clause, void. See *Printz*, 521 U.S. at 914.

federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular," 505 U.S. at 168.

The Comptroller's regime has the same demerit, denying the *people* of New York the power to hold those enforcing their laws accountable. "The Constitution * * * contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. Here, as in *New York*, "[a]ccountability is diminished when * * * elected state officials cannot [make law enforcement decisions] in accordance with the views of the local electorate in matters not pre-empted by federal regulation," 505 U.S. at 169.

Such a federal interposition between the state citizenry and those they select to enforce their laws is fundamentally inconsistent with the principle of "'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Saenz* v. *Roe*, 526 U.S. 489, 504, n.17 (1999) (quoting *U.S. Term Limits,* 514 U.S. at 838 (Kennedy, J., concurring)). Finally, although, this Court has made clear that "it is the very *principle* of separate state sovereignty" that matters most, *Printz,* 521 U.S. at 933, this regime would fare poorly on any balancing test: hundreds, if not thousands, of valid laws enacted at the state level, for the direct protection of state citizens against wrongful behavior, may no longer be enforced there.

B. The Regime Drastically Alters The State-Federal Balance

Constitutional questions aside, this Court's precedents place a heavy burden on statutory interpretations like OCC's, requiring their proponents identify a clear statement, enabling a court to be "absolutely certain" that Congress intended the regime. See *Gregory*, 501 at 464; *Bass,* 404 U.S. at 349; accord *Will* v. *Michigan Dept. of State Police,* 491 U.S. 58, 65 (1989).

The majority below refused to apply that rule, on the ground that "the exercise of 'traditional' state power in the context of national banking regulation is already substantially qualified," 510 F.3d at 114, and that "Congress has already expressed its intent to limit the role of the states in regulating national banks," *id.*

But these are non-sequiturs. First, the *Bass* Court did not confine the principle to interpretations that would depart from some platonic "traditional balance;" it recognized "significant[] change[s]" in the "federal balance" as "traditionally sensitive," 404 U.S. at 359. Indeed, the decisions with which the clear statement rule is associated arose in areas where the federal presence was already substantial: Congress (indeed the Constitution) had "expressed its intent to limit the role of the states" in *Gregory*, which involved an employment discrimination statute specifically directed at the States – and arguably enacted pursuant to § 5 of the Fourteenth Amendment, see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976), and *BFP*, 511 U.S. at 544 & n.8, involved a statute passed pursuant to the power to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const., art. I, § 8, cl. 4.

The change to the existing balance sanctioned by the courts below – what the majority described as "accreting a great deal of regulatory authority to [a federal official] at the expense of the states," 510 F.3d 119 – surely rates as "significant." The power to enforce state laws is not one traditionally exercised by the federal government, and while Congress not infrequently incorporates state law *standards* into federal laws (and has, on occasion, directed federal authorities to enforce state law, see, *e.g.*, *Printz*, 521 U.S. at 911), examples of *exclusive* federal enforcement of state laws are vanishingly few.[2] Cf. *id.* at 928 ("It is no more compatible with [State] independence and autonomy that their officers be 'dragooned' * * * into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws") (citation omitted).

The laws affected by the regulation are ones at the unquestioned core of States' police powers. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980) ("both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern"); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624

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[2]The Assimilative Crimes Act, 18 U.S.C. § 13, covers *territory* over which the federal government exercises police powers – and punishment is treated as federal. And unlike here, exclusion of state prosecutors is not accompanied by inclusion of private enforcement. Likewise, 18 U.S.C. § 1166(d), is rooted in Indian Tribes' status as quasi-sovereigns – a status even the OCC has not yet claimed for its national bank constituency.

(1984) (noting that State's civil rights law pre-dated the Civil Rights Act of 1875 "and protect[ed] the State's citizenry from a number of serious social and personal harms"). Indeed, while these matters have long been a subject of legislative activity at the state level, many of the specific measures whose enforcement would be immediately affected were recent enactments, targeting dangerous new abuses – that were producing calamitous effects at the community level. See Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1319-22 (2006).

In concrete terms, the nature and scope of the power shift the regulation purports to effect could only be called dramatic. By a stroke of the Comptroller's pen, responsibility to enforce multiple categories of laws of each of 50 States has been denied to the officials who are most familiar with their meaning and operation and with the local conditions they address – and who would, but for the OCC's action, act attentively to the preferences of the enacting legislatures and the citizens who put them in office.

Moreover, the agency that has overtaken this responsibility is a banking regulator that would be a doubtful choice for primary enforcer of consumer protection and antidiscrimination laws, let alone the diverse laws of fifty States. Despite the OCC's assertion in the rulemaking of a "beli[ef]" that it "has the resources to enforce applicable laws," 69 Fed. Reg. at1915, it does not have procedures for examining compliance with state law, see U.S. G.A.O., OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION

LAWS TO NATIONAL BANKS 22-23 (2006); the responsibilities described would devolve to small numbers of OCC employees; remedies in OCC proceedings are not coextensive with relief available in courts, see 12 U.S.C. § 1818(b); and many of OCC's actions are confidential. See Quester & Keest, *Looking Ahead After Watters v. Wachovia Bank*, 27 REV. BANKING & FIN. L. 187, 235-36 (2008) (noting OCC website informing consumers that, by law, "the OCC cannot release any information relating to any supervisory actions or regarding whether a violation of law or regulation occurred in connection with your complaint"). Thus, even if OCC viewed enforcement of these laws as a genuine priority, but see *infra*, the agency's powers, resources, and expertise are not a minimally plausible substitute for the regime it seeks to displace. See, *e.g.*, Bar-Gil & Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 92 (2008) (contrasting thousands of consumer enforcement actions at state level with a handful by the OCC, noting that OCC's large enforcement actions were begun by state authorities, over OCC objections).[3]

A necessary implication of the Second Circuit's rejection of the clear statement rule is that the disruption of the federal-state balance here is less

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[3]Indeed, OCC's own counsel has acknowledged that "more than twenty-five years" elapsed between the agency's recognition that it had "authority to enforce the FTC Act" and its first effort to do so. See Williams & Bylsma, *On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks*, 58 BUS. LAW. 1243, 1244 (2003).

significant (or less sensitive) than the one presented to the Court in *Bass*. But not only did *Bass* cite the potentially "substantial extension of federal police resources," 404 U.S. at 350, the government's interpretation would entail, as a reason for skepticism (a consideration that weighs much heavier here), but the interpretation rejected in *Bass* would have worked no categorical shift. It would not have denied the States power to continue prosecuting the activity under their laws -- and the federal power contemplated would have been entirely familiar: a United States Attorney's office enforcing federal criminal law before federal courts.

A closer analogy to the facts presented here would be if the government in *Bass* had urged the statute be construed to make federal officials the *only* prosecuting authority for countless state law offenses; administrative tribunals the forum for deciding those cases; and placed enforcement responsibility in the hands of an agency with minimal enforcement resources and modest experience in the criminal justice field.

Hypotheticals aside, it would be difficult to maintain that the actual *Bass* case addressed a more significant or sensitive shift in the federal-state balance than the one disputed here. Without questioning the genuineness of the incipient threat perceived by the *Bass* Court, see *Lopez*, 514 U.S at 615 (Souter, J., dissenting) ("Not every epochal case has come in epochal trappings"), it is significant that no State asked the *Bass* Court to adopt the narrow construction – whereas 46 States participated in this case at the court of appeals level, urging invalidation of the regulation.

Finally, the Second Circuit majority's view suggests an inaccurate understanding of the "historic balance" in "the field of regulation of national banks." First, there is no suggestion that Congress chose to limit state *regulation* in *this* area – the non-preempted laws continue to apply to national banks (nor did the majority below conclude that Congress intended to displace state enforcement – saying only that it had not precluded the OCC from deciding to, see *infra*).

Far from the field preemption regime suggested by the Second Circuit, this Court long ago described the relevant landscape "to contain a rule and an exception-'the rule being the operation of general state laws upon the dealings and contracts of national banks," *McClellan* v. *Chipman*, 164 U.S. 347, 357 (1896). See *National Bank* v. *Kentucky*, 76 U.S. 353, 362 (1869) ("national banks are subject to the laws of the State").

Indeed, there is a long history of banks' asserting broad federal immunities – and courts' declining to oblige. Compare 510 F.3d at 114 (describing banks as "creatures of federal statute, * * * subject first and foremost to federal law") with *Atherton*, 519 U.S. at 222-23 ("To point to a federal charter by itself shows no conflict, threat, or need for 'federal common law'"); *St. Louis*, 263 U.S. at 643 (counsel's argument Congress had "occupied the entire field" of national bank regulation); accord *McClellan*, 164 U.S. at 358 (rejecting preemption argument, observing that "in the broadest sense, *any* limitation by a State on the making of contracts is a restraint upon the power of a national bank") (emphasis added).

And while banks and the OCC frequently point to early decisions under the National Bank Act – and

even to the Marshall Court's decisions in *McCulloch* v. *Maryland*, 17 U.S. 316 (1819) and *Osborn* v. *Bank of the United States*, 22 U.S. 738 (1824), as having fixed the balance, those cases focused on state laws' potential to "incapacitate[] the banks from discharging their *duties to the government*," *Kentucky*, 76 U.S. at 362, and such claims were "radically changed" by the 1913 passage of the Federal Reserve Act, 38 Stat. 251, see 12 U.S.C. § 221 *et seq.*, which, "established the Federal Reserve System as the sole monetary and fiscal agents of the United States," *First Agr. Nat. Bank of Berkshire County* v. *State Tax Comm'n*, 392 U.S. 339, 356 (1968) (Marshall, J., dissenting) and "greatly reduced the importance of the distinction between national and nonnational banks," FRIEDMAN & SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 1867-1960 at 196 (1974).[4]

Whereas, under the original NBA, national banks were recognized to be "National favorites" because "[t]hey were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government," *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. 409,

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[4]The majority in *First Agricultural Bank* found it "unnecessary to reach * * * whether today national banks should be considered nontaxable as federal instrumentalities," concluding that 12 U.S.C. § 548, which allowed taxation in specific areas, impliedly precluded other taxation. *Id.* at 345. Shortly thereafter, Congress amended the provision, subjecting national banks taxation to the same extent as those chartered by the State. *See United States* v. *State Board of Equalization*, 639 F.2d 458, 461 (9th Cir. 1980).

413 (1887), a modern-day national bank "is a privately owned corporation existing for the private profit of its shareholders. It performs no significant federal governmental function that is not performed equally by state-chartered banks," *First Agr. Bank*, 392 U.S. at 354-55 (Marshall, J., dissenting). Cf. *Watson* v. *Philip Morris Companies, Inc.*, 127 S. Ct. 2301, 2307-09 (2007) (private party complying with federal official's order does not "act[] under" the officer, for purposes of removal statute, 28 U.S.C. § 1442(a)(1)).

C. The Judicial Safeguards of Federalism Are Of Greater Importance Where Agency Action Is Involved

Although this Court has explicitly recognized that the canons of construction requiring clear statements have "heightened" force in the context of administrative action, *SWANCC*, 531 U.S. at 172-73, the decision below and others have rejected a similar approach in "ordinary" preemption cases and have instead applied a *de facto* "*Chevron* exception" to general rules for analyzing assertions of federal preemption, according broad deference to federal agency rules purporting to declare State laws preempted on "frustration of purpose" grounds or advancing aggressive interpretations of express preemption clauses – and accepting with an uncritical eye assertions of congressional authorization of regulations with substantial State-law displacing effect.

These broad extensions of *Chevron* deference are neither logical nor reconcilable with this Court's precedent. To allow State law to be displaced based on silence or ambiguity in a federal statute, *Chevron*, 467 U.S. at 843, is at odds with the rule that displacement

requires a showing of "clear and manifest" congressional intent, *Rice*, 331 U.S. at 230, just as the directive that courts accept agency constructions that "differ[] from what the court believes is the best statutory interpretation," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005), is not readily squared with the rule that courts must read ambiguous preemption clauses in a way "that disfavors pre-emption," *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

A rule more accepting of claims of administrative than statutory preemption is irreconcilable with basic constitutional norms. Such a rule would evade the very "political process" that modern constitutional law relies on to protect States' interests. See *Gregory*, 501 U.S. at 464; *INS* v. *Chadha*, 462 U.S. 919, 953 (1983) (discussing bicameralism and presentment requirements, U.S. Const., art. I, § 7, for exercise of legislative power). States are not represented in Executive Branch agencies, and regulations do not require concurrence of two branches. Nor may the Court's acknowledgment that "the state-displacing weight of federal law" should not be given to "mere congressional *ambiguity*," *Gregory*, 501 U.S. at 464 (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6.25, p. 480 (2d ed. 1988)), fairly be limited to a narrower class of especially sensitive statutes; by its terms, the statement describes "ordinary" preemption, and *Gregory* itself describes its plain statement rule as rooted in preemption case law. See *id.* at 460-61 (citing, *inter alia*, *Rice*, 331 U.S. at 230).

Moreover, the premises underlying the *Chevron* doctrine, that agencies have greater expertise and democratic accountability than do courts -- have less

force in preemption cases. Preemption is, after all, a constitutional question, U.S. Const. art. VI, § 2, and agency expertise in statutes they administer is not matched by sensitivity to policies and purposes served by State law. Thus, while examples abound of courts' undertaking to conserve State law and rejecting overbroad preemption assertions, agencies are more likely to take a maximalist approach, see *infra*. And to the extent *Chevron* deference rests on a presumption that silence or ambiguity ordinarily is intended to be a delegation, that premise is empirically more questionable and legally more problematic where displacement of state law is concerned. States look to federal *courts* rather than federal agencies for a fair hearing – and to maintain balance. See *Lopez*, 514 U.S.

Finally, a legal regime that makes Congress the "tryout on the road" and agency rulemaking the "main event," see *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977), for preemption questions – thereby relieving parties seeking preemption of the "obligation to pull, haul, and trade," *Johnson* v. *De Grandy*, 512 U.S. 99, 1020 (1994), in the legislative arena – makes it especially likely that the constitutionally-contemplated deliberation will *not* occur.

This does not mean that administrative regulations may never be given preemptive effect. But "[t]he purpose of Congress" should remain "the 'ultimate touchstone' in *every* pre-emption case." *Medtronic*, 518 U.S. at 485 (emphasis added) (citation omitted). See *Louisiana Public Serv. Comm'n* v. *FCC*, 476 U.S. 355, 369 (1986)) ("[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law"). And there is,

for a preemption purposes, "a vast and obvious difference between rules authorizing or regulating conduct and rules granting immunity from regulation." *Watters* v. *Wachovia Bank,* 127 S. Ct. 1559, 1583 (2007) (Stevens., J, dissenting). Practical realities aside, it is a long constitutional leap from treating a valid regulation as a "law" for purposes of the Supremacy Clause, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) – and therefore enjoining inconsistent state laws – to giving binding effect to an agency's broad assertions about a state law's capacity to impair the "purposes" of a federal statute. Wholesale declarations of federal exclusivity are unlikely to rest on any particularized exercise of agency expertise, and highly likely to reflect agencies' political remoteness from, or even hostility to, state interests.

D. There is No "OCC Exception" To These Principles

Reasons for close judicial review apply with full force where the OCC is concerned. There can be no expectation that, in resolving conflicting claims of State and federal power, the Comptroller may be relied on to "hold the balance true," *Illinois* v. *Gates*, 462 U.S. 213, 241 (1983). Even leaving aside nonaccountability to the citizens of the affected States, see *supra*, the Comptroller is less *federally* accountable than most Executive Branch officials: the President's appointment and removal powers are constrained, 12 U.S.C. § 2; the Secretary of Treasury is forbidden from "delay[ing] or prevent[ing] the * * * promulgation of any regulation by the Comptroller," *id.* § 1; and, quite unusually, the agency does not depend on

congressional appropriation for its operations. Bar-Gil & Warren, *supra*, at 93.

Instead, the Office's budget is funded almost entirely by assessments against the parties it regulates. *Id.* ("[A]ssessments comprise 95% of the OCC's budget"). And more unusually still, its jurisdiction over these institutions is a matter of volition on *their* part. Thus, in 2004-2005, in the immediate wake of the regulation at issue here, "charter conversions of three large [institutions] * * * resulted in the transfer of $1 trillion of banking assets into the OCC's jurisdiction * * * and raised assessment revenues by 15%," *id.* at 93 & n.300. Cf. *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Finally, the Office historically has done little to separate its roles as decider of preemption questions and participant in the competition for financial institutions' allegiance. See, *e.g.*, Speech by Comptroller John D. Hawke, Jr. (Feb. 12, 2002) (describing preemption as "a significant benefit of the national [bank] charter – a benefit that the OCC has fought hard over the years to preserve"), quoted in Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 274 (2004).[5]

As this case attests, OCC has increasingly eschewed preemption doctrines that would depend on considering

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[5]State chartering authorities do not compete on this basis: they cannot preempt state laws, and they share oversight authority with the FDIC and the Federal Reserve and are subject to the enforcement authority of State Attorneys General.

(or demonstrating in court) that a particular state law (or enforcement of state law) imposes an *actual*, substantial burden on a congressional objective or an actual conflict with an agency regulation on the same subject; it has gravitated instead toward claims that *any* state regulation is an impermissible condition on or impairment of congressionally-conferred powers, or, as here, an invasion of some broadly-defined exclusive jurisdiction – without any claim that the Comptroller has regulated in the field or intends to (or even has affirmatively concluded that regulation is undesirable). See 510 F.3d at 118-119 (noting that instead of "articulat[ing some] rational connection between * * * facts found and the choices made," "the OCC does not appear to have found any facts at all," and relied "almost entirely [on] the agency's interpretation of case law, legislative history, and statutory text") (citation omitted); *Perdue* v. *Crocker National Bank*, 702 P.2d 503, 525 (Cal. 1985) (refusing to "presume, without evidence, that prohibiting a national bank from setting unreasonable prices or enforcing an unconscionable contract will render that bank less efficient, less competitive or less able to fulfill its function in a national banking system").

Unlike federal courts, which are obliged to (and do) search for alternatives that would allow accomplishment of federal objectives while minimizing displacement of state law, the OCC has treated assertions of national "uniformity" and "unitary regulation" as unanswerable – even in cases, like this one, where they are not even logically relevant, see *infra*. See Bar-Gil & Warren, *supra*, at 92; *Atherton*, 519 U.S. at 220 ("To invoke the concept of 'uniformity,' however, is not to prove its need"). Compare *Egelhoff*,

532 U.S. at 160 (Breyer, J., dissenting) (describing courts as "apply[ing] pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy").

The OCC has taken a "preempt first, ask questions later" approach, offering scant support for critical empirical assertions, including that it "has the resources to enforce applicable laws [and] * * * ensure that consumers are adequately protected," 69 Fed. Reg. at 1915. Indeed, even when it has purported merely to restate "judicial precedent," OCC has taken a tendentious approach. Thus, while this Court's decision in *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25 (1996), described preemption as reaching state laws that "*forbid*, or * * * *impair significantly*, the exercise of a power that Congress explicitly granted," *id.* at 33 (emphasis supplied), OCC has omitted the word "significantly," substituted "authorized" for "power explicitly granted," and indicated that anything less than "full[] exercise" constitutes an actionable frustration of congressional purposes. See 12 C.F.R. § 7.4009(b); Wilmarth, *supra* at 247 & n.81.

These actions have occurred at a fateful moment. State governments, closer to the people, were the first to see – and then to experience – the predatory lending and foreclosure crises and sought to enact laws pursuant to their historic powers and enforce these against wrongdoing financial institutions, without regard to the identity of the chartering authority. See Wilmarth, *supra* at 253-65. The adverse effects of the

OCC's brushing aside of vast tranches of state regulation are not merely theoretical.

II. No Permissible Construction of The Act Supports The OCC's Asserted Power

In sustaining the regulation, the court below stopped short of saying that the regime was intended by Congress; rather, the panel stated that it did not "agree * * * that the statute clearly precludes the interpretation the OCC has adopted," 510 F.3d at 117. Indeed, as the majority opinion attests, the regulation could not even survive a junior version of the clear statement rule: even if it were not established that *Congress* must face these issues, *the agency* here "accret[ed] a great deal of regulatory authority to itself at the expense of the states," without "hav[ing] found any facts at all" in a rulemaking that "lacked any real intellectual rigor or depth"– and offered only "cursory analysis," 510 F.3d at 119.

The court instead concluded that this absence of a clear contrary statement, along with "[im]precis[ion]" as to the "scope of 'visitorial' powers," and a grant of general rulemaking power, 12 U.S.C. § 93a, sufficed to entitle the regulation to *Chevron* deference. The court then pronounced itself satisfied that "the OCC reached a permissible accommodation of conflicting policies." 510 F.3d at 120. This was misguided.

First, as this Court has repeatedly explained, it is the presumed congressional delegation, not verbal ambiguity itself, that supplies agency power, *Gonzales*, 546 U.S. at 255, and agency assertions remain subject to testing for plausibility. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *Christensen* v. *Harris County*, 529 U.S. 576, 590 n. *

(2000) (Scalia, J., concurring in part and concurring in judgment). The fact that Congress did not expressly confirm States' power to enforce their own non-preempted laws is no delegation: "A 'gap' is not created in a statutory scheme merely because a statute does not restate [a] truism," *Adams Fruit Co., Inc.* v. *Barrett*, 494 U.S. 638, 649 (1990). And this case is surely one where common sense, see *Gonzales*, 546 U.S. at 274, no less than constitutional principle, warns against the agency's claim. See *id.* at 267 ("the idea that Congress gave * * * such broad and unusual authority through an implicit delegation is not sustainable").

These concerns aside, the OCC's purported reinterpretation of "visitation" is simply not a permissible one. Whatever uncertainty might attend the term's "*precise* scope," 510 F.3d at 117 (emphasis added), the text of § 484(a) is unambiguous in the respect relevant here: Nothing in its language is open to the interpretation *the OCC* sought to impose – as contemplating two classes of state laws: one, conventionally preempted (*e.g.*, those which would authorize state examiners to supervise national banks) and a second, enforceable against banks, but only by the federal government (and such private parties as a State has authorized). See *MCI Telecommunications Corp.* v. *AT&T Co.*, 512 U.S. 218, 231 (1994).

On the contrary, although the statutory term has limited modern resonance, definitions and practice contemporaneous to the NBA's enactment make clear that "visitation" refers to the authority of the chartering authority (or donor, in the case of a charity) to assure that the corporation is staying within the powers granted and the by-laws established for it. See

Trustees of Dartmouth College v. *Woodward*, 17 U.S. 518, 595, 676 (1819) (equating charter as a contract and by-laws as "its statutes"). On this understanding, the chartering authority has exclusive responsibility for examining the corporation and assuring compliance with "its [the corporation's] laws" – but that would not preclude other sovereigns from enforcing *their* otherwise applicable, general laws.

Remarkably, the very claim at issue here was advanced – unsuccessfully – in *St. Louis*. There, the Comptroller argued that, preemption aside, the predecessor version of the "visitorial powers" prohibition was an independent bar to the Missouri Attorney General's enforcing his State's anti-branching law against a national bank. See 263 U.S. at 643 (counsel's argument). After holding the law not preempted, the Court rejected the Comptroller's claim in emphatic terms. "[T]hat the United States alone may inquire * * * whether a national bank is acting in excess of its charter powers," the Court explained, was beside the point – because:

> What the state is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation.

Id. at 660.

The OCC's 2004 "reinterpretation" repeats the very same "complete misconception," *id.*, this Court identified in its 1924 argument.[6]

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[6]Nor does any other decision cited in the OCC's rulemaking suggest the critical ambiguity the

Finally, in pronouncing the rule "reasonable," the decision below did not apply the "rigor" it rightly found lacking from the OCC's analysis. Not only did the court allow the agency to displace States without any factual finding, but it uncritically accepted generic policy "interests," that, while typically helpful to OCC preemption claims, do not in fact support this one. This regulation *does not* in fact "prevent inconsistent * * * state regulation," 510 F.3d at 111 – it purports to respect, *not preempt* state laws – which are, by their nature, inconsistent; and, to the extent private lawsuits qualify as "state regulation," it preserves them, as well. Nor, by this token, does it assure that national banks answer to a single regulator, *id.* at 120: under the regime, they will answer to juries in state court class action lawsuits, as well as the OCC – just not state law enforcement officials.

Conclusion

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Comptroller professed to rely on: the most plausible support OCC summons turns out to be an artifact of its own paraphrasing. *Guthrie* v. *Harkness*, 199 U.S. 148, 159 (1905) *did not* equate visitation with "enforc[ing] observance of *the* laws and regulations," 69 Fed. Reg. at 1899 (emphasis added) but rather "*its*," – *i.e.*, *the corporation's* – laws, 199 U.S. at 159 (emphasis added) (citation omitted).

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AMICUS CURIAE BRIEF

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ANDREW M. CUOMO, in his official capacity as Attorney General of New York,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CONNECTICUT FAIR HOUSING CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a nonprofit, public interest organization dedicated to ensuring equal housing opportunity to all Connecticut residents and to combating discriminatory housing practices. In the more than one-hundred cases it has filed in both state and federal courts to enforce fair housing laws, the Connecticut Fair Housing Center has witnessed the primary role that states have played in enacting and enforcing laws to protect consumers from financial institutions' abusive practices. Over the last few years, the Office of the Comptroller of the Currency ("OCC") has sought to immunize national banks from the reach of state laws and state law enforcement. The interest of the Connecticut Fair Housing Center in this case stems from its desire to ensure that Connecticut customers of national banks benefit from the critical protections afforded by state law and state officials' enforcement efforts, and that its litigation on behalf of Connecticut residents is not burdened by federal preemption of state fair housing laws.

SUMMARY OF THE ARGUMENT

There is no basis in history or policy for federal preemption of the New York Attorney General's

[1] A letter of consent from each of the parties has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or counsel made a contribution to the preparation or submission of this brief.

request for information regarding lending abuses. First, the Attorney General's request is not an exercise of the "visitorial power" as understood historically. Thus, the National Bank Act, which prohibits states from exercising "visitorial powers" over national banks, should not be interpreted through regulation or otherwise to preempt the Attorney General's action. Second, the costs and benefits of the Attorney General's request are localized within New York. His request, consequently, raises none of the concerns about costly externalities that underlie Congress's policy of preempting visitorial powers under the National Bank Act.

Historical Meaning of "Visitorial Power"

As a matter of historical meaning, the "visitorial power" refers only to state supervision of the internal affairs of corporations for consistency with their charters, and not to state regulation generally. Originating in supervision of ecclesiastical forms, charitable institutions, and municipal corporations, the visitorial power enabled the state to ensure the compliance of these organizations with their charters and donative intents. The same understanding of the limited scope of the visitorial power – to assure compliance with charter procedures and limitations on chartered power – naturally transferred to the term's original extension to business corporations in Anglo-American law. This internal affairs understanding persisted at the time of the enactment of the National Bank Act, as leading treatises, this Court's precedent, and numerous lower court examples demonstrate.

In contrast, the New York Attorney General's request for information on discriminatory lending

falls well outside of this historical meaning. It has nothing to do with the internal affairs of the bank as a chartered entity. Furthermore, the similarity in method between the Attorney General's request for information and the historical exercise of some of the visitorial power by inspection of records is inapposite. The historical record demonstrates that states also used such methods in the exercise of non-visitorial power, such as the police power. Similarity in method is thus a red herring.

Economic Policy Undergirding the National Bank Act

Furthermore, enforcing antidiscrimination measures with respect to locally originated mortgages does not implicate the policy concerns that undergird federal preemption of visitorial powers. The federal policy underlying the preemption of visitorial powers aims to prevent states from regulating national banks in ways that give rise to externalities that (1) make the operation of a national bank untenable, or (2) render national banks uncompetitive in other states. Fair lending regulation targeting mortgage origination within a state's borders does not create such a risk of adverse effects in other states. New York State does not seek to investigate discriminatory lending patterns across the entire geographical range in which banks do business, but only with respect to loans originated within the state. By limiting its inquiries to the banks' operations within the state, and by making no requirements on the corporate or financial structure of the banks, New York avoids any concern of externality problems.

Any residual concerns about antidiscrimination measures giving rise to a patchwork of regulations

should be allayed in light of the fact that the racially discriminatory lending practices that New York seeks to investigate are a violation of federal law. State enforcement of federal antidiscrimination regulations does not create a risk of preventing national banks from creating uniform national banking standards or burdening financial institutions with a patchwork of conflicting state regulations. Thus, the most important motivation for the proscription against visitorial powers is simply inapposite in this case.

ARGUMENT

I. AS A MATTER OF HISTORICAL MEANING, THE NEW YORK ATTORNEY GENERAL'S REQUEST IS NOT AN EXERCISE OF VISITORIAL POWERS.

The touchstone of statutory interpretation is congressional intent. The statutory language is "[t]he most probative evidence of congressional intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). To analyze the text, this Court relies on the meaning of words at the time of the statute's enactment. See *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) ("At the time of the FSIA's adoption in 1976, a "lien" was defined as . . . ."); *Eldred v. Ashcroft*, 537 U.S. 186, 199-200 (2003) (emphasizing that "[a]t the time of the Framing, that word meant what it means today"); *Utah v. Evans*, 536 U.S. 452 (2002) (arguing that "[f]urther support is added [to the Court's interpretation] by contemporaneous general usage, as exemplified by late-18th-century dictionaries defining 'enumeration'"). Without attention to historical meaning, absurdity often results. See Jack M. Bal-

kin, *Original Meaning and Constitutional Redemption*, 24 Const. Comment. 427, 429-31 (2007) ("In 1787 the words "domestic Violence" [in the Republican Government Clause] generally meant riots or disturbances within a state (as opposed to foreign attack); today the words primarily refer to assaults and batteries by intimates or by persons living in the same household.").

In this case, the key provision of the National Bank Act prohibits the exercise of "visitorial powers" by the states. 12 U.S.C. § 484(a). As a matter of historical meaning, visitorial powers only refer to state supervision of the internal affairs of corporations. Originating in supervision of ecclesiastical forms, charitable institutions, and municipal corporations, the visitorial power enabled the state to ensure the compliance of these organizations with their charters. The same understanding of the limited scope of visitorial power – to assure compliance with the charter procedures and limitations on chartered power – naturally transferred to the term's original extension to business corporations in Anglo-American law, and persisted at the time of the enactment of the National Bank Act, as leading treatises, this Court's precedent, and lower court examples demonstrate.

In contrast, the New York Attorney General's request for information on discriminatory lending does not involve internal affairs. It has nothing to do with the functioning of the bank as a chartered entity. Furthermore, the similarity in method between the Attorney General's request for information and the exercise of some the visitorial power by inspection of records and suits to enjoin action is inapposite because the historical record demonstrates that states

used such methods in the exercise of non-visitorial power, such as the police power.

A. Historically, Visitorial Power Refers Only to State Supervision of the Internal Affairs of Corporations.

1. The concept of visitorial power originated to describe the supervision of the internal affairs of chartered organizations – ecclesiastical forms, charitable or eleemosynary institutions, and municipal corporations – for compliance with their charters.

a. *The visitorial powers emerged to supervise the compliance of charities and churches to donative intent.* Visitorial powers arose in ancient Rome and the Middle Ages to provide for supervision of charities and churches for compliance with their intrinsic purposes by ecclesiastical supervisors. Justinian, for example, provided that bishops should supervise the execution of donations for pious purposes, ordering "the most holy bishops [to] see that all such testamentary dispositions are observed in accordance with the intentions of the deceased." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 369 (1936) (quoting Justinian's Code). Canon law also commanded bishops to visit dioceses and parishes to prevent abuses. *Id.* at 369-70 (quoting canon law and church constitutions); see Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* § 686, at 637 (John Lathrop ed., 7th ed. 1861).

Eventually, as religious charities declined and secular and lay charities multiplied, the visitorial power began to rest in the founder of the charity and his heirs. Pound, *supra*, at 371. The "origin of such a

power," as one treatise writer puts it, "is the property of the donor, and the power every one has to dispose, direct, and regulate his own property." Angell & Ames, *supra* § 687, at 637 (paraphrasing Lord Hardwicke). The purpose of this visitorial power was to aid donors "looking to the security of the funds, and that the interest or income of them be applied according to the bequest." *Id.* § 687, at 638. When the founder or appointed visitor passed away, visitorial power passed to the government. *Id.* § 695, at 652 ("It is now, however, well settled, in England, that if there be no person who can act as visitor, the duties of that office devolve upon the king; which it then becomes the task of the Court of Chancery to execute . . . ."). See *Dominus Rex v. Episopum Chester,* 93 Eng. Rep. 855 (K.B. 1727) (issuing mandamus to corporate officer where the officer was also the visitor, on the grounds that the court had to exercise the visitorial power where dual office-holding prevented the officer from visiting himself).

The visitorial power provided the ability to supervise the internal workings of the organization. Visitors of colleges could "correct abuses, remove officers . . . expel or admit a fellow, and generally superintend the management of the trusts." Angell & Ames, *supra*, § 688, at 640. In *Philips v. Bury*, for example, the visitor of a college traveled to it and upon being rebuffed by the rector and scholars, deprived the rector of his position. 990 Eng. Rep. 198, 201 (1692). See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 674 (Story, J., concurring) ("The nature and extent of this visitatorial power has been expounded with admirable fulness and accuracy by Lord HOLT in one of his most celebrated judgments. *Phillips v. Bury*."); Angell & Ames, *supra*, § 689, at 644-45 (discussing the same).

The courts "put the visitorial power in motion" to aid these private visitors. Angell & Ames, *supra*, § 689, at 645. Visitorial powers could be extended beyond internal workings by an organization's charter, but supervision of internal affairs constituted an inherent power. *Id.* § 689, at 644.

This makes the visitorial power similar to the power to supervise trusts. In fact, when trustees or a board of governors were involved in the government of a college or academy, the "the visitatorial power [wa]s deemed to belong to them." *Id.* § 687, at 639. As Dean of the Harvard Law School Roscoe Pound summarized, "[t]here is as much ground for saying that the jurisdiction over charitable institutions is visitatorial as there is for saying that the visitation of such institutions rests on a jurisdiction over trusts." Pound, *supra*, at 374.

b. *The Transition to Municipal Corporations.* The application of the visitorial power to municipal corporations began the transition toward use of the concept in the context of business corporations. As "common law courts were called on in the course of private litigation to pass upon the reasonableness of borough customs and by-laws," it "became easy to say that as municipal corporations had no founders and so were not subject to visitation by any private visitors, they were subject to visitation by the King." Pound, *supra*, at 370.

Here, too, the power was used to enforce the internal by-laws and procedures of the corporations. For example, in *Attorney-General v. Mayor of Galway*, the Attorney General proceeded against the Mayor of Galway on the grounds that the town was violating its charter. 1 Molloy 95 (Ir. Ch. 1828). The

terms of the charter provided that certain tolls be used for walling and paving the town. The Attorney General's suit, noting that the streets had been neglected and the walls had fallen into decay, requested that the municipality be required to repair the pavements out of the proceeds of the tolls, under the supervision of the court. The court agreed. *Id.* See *Att'y Gen. v. R.R. Cos.*, 35 Wis. 425, 523-24 (1874) (upholding visitorial power of the Attorney General to proceed for corporate violation of charter); Pound, *supra*, at 372. Similarly, in *State* ex rel. *Circuit Att'y v. Saline County Court*, the government proceeded against a county to enjoin issuance of bonds to pay an unauthorized subscription of railroad company stock. 51 Mo. 350 (1873). See Pound, *supra*, at 383. As Pound recognized, the injury in these cases was not harm to the public, but violation of the charter. *Id.* at 383.

c. *The Extension of Visitorial Powers to Business Corporations.* The concept eventually was extended to government supervision of the internal affairs of business corporations for compliance with their chosen forms. By the time of the reception of the English common law into America, it was widely recognized that "[e]very corporation of the state, whether public or private, civil or municipal, is subject to this superintending control, although in its exercise different rules may be applied to different classes of corporations." *State v. Milwaukee Chamber of Commerce*, 3 N.W. 760 (Wis. 1879); see 2 Stewart Kyd, *A Treatise on the Law of Corporations* 17 (1794) (observing that all corporations were subject to visitation "in order to maintain the peace and good government of corporations and secure their adherence to the purposes of their institution."). As one leading treatise summarizes, "[i]t may now be said that in the United States

visitorial power over all corporations – except private eleemosynary corporations – existing under and by virtue of the laws of the state, rests in the state." 1 Samuel D. Thompson, *Commentaries on the Law of Private Corporations* § 476, at 581 (2d ed. 1908).

The visitorial power's placement in the state stemmed from the state's power to grant or deny charters to the corporations. See *id.* (noting that "all corporations emanate from legislative enactment, so the visitorial powers are lodged in the state"); *State v. Georgia Med. Soc'y*, 38 Ga. 608, 627 (1869) (noting that the fact that a corporation accepted a charter makes it subject to the state's visitorial jurisdiction). See also *Wilson v. United States*, 221 U.S. 361 (1911) (holding that the visitorial power is strong enough to force disclosure of records, despite any self-incrimination that may result).

2. The same "internal affairs" understanding of the scope of the visitorial power persisted through the time of the National Bank Act.

By the time of the application of the concept of "visitorial powers" to business corporations in America, therefore, the term "visitorial powers" had a rich but unified history: it was applied to several different types of corporations and institutions, but always to supervise the internal affairs of such corporations and institutions against their charters or donative intentions. This understanding persisted at the time of the enactment of the National Bank Act: the visitorial power was understood to encompass only the power to review the internal affairs of corporations, such as compliance with the charter, acts exceeding the charter's authority, and internal management procedures. Leading treatises, this Court's precedent,

and lower court examples all confirm this understanding of the scope of visitorial powers.

a. *Leading treatises affirm the internal affairs understanding.* The leading treatises confirm this understanding. In the leading treatise, *Law of Private Corporations Aggregate*,[2] Joseph Angell and Samuel Ames write that "[t]o render the charters or constitutions, ordinances, and by-laws of corporations of perfect obligation, and generally to maintain their peace and good government, these bodies are subject to visitation." Angell & Ames, *supra*, § 684, at 636 (emphasis in original). In other words, the visitorial power assures compliance with internal rules of corporations.

Thompson on Corporations[3] similarly remarks that the visitorial power consists of being an "ever-present visitor in the internal management of corporations . . . the state checks and controls corporate affairs." Thompson, *supra*, § 475, at 580. The "purposes of visitation," Thompson continues, is based on the fact that individuals are liable "to deviate from the end of their institutions." *Id.* §477, at 582. As Dean Pound summarizes when explaining the power of mandamus in the visitorial context, "the basis of mandamus . . . is the visitorial jurisdiction of the

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[2] This Court relied on the treatise over forty times in corporate law cases during the nineteenth and early twentieth centuries. *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 86 (1906); *Hawes v. City of Oakland*, 104 U.S. 450, 458 (1881); *Outlon v. Sav. Inst.*, 84 U.S. 109, 119 (1872); *Planter's Bank v. Sharp*, 47 U.S. 301, 311 (1848); see *Cook County, Illinois v. United States* ex rel. *Chandler*, 538 U.S. 119, 127 (2003).

[3] This Court has relied on this treatise several times as well. *E.g.*, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 266 (1992); *Ross v. Bernhard*, 396 U.S. 531, 537 (1970); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 596 (1921).

state over all corporations which it has created . . . It [the visitorial jurisdiction] lies to compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters." Pound, *supra*, at 375. See Henry L. Pitts, Comment, *Corporations – Equitable Interventions in Corporate Affairs – Meaning of "Internal Management,"* 35 Mich. L. Rev. 1085, 1086 (1939) (comparing visitorial powers to "internal affairs" of corporation, such as stockholder interactions). See also Note, *Inquisitorial Powers of Federal Administrative Agencies*, 48 Yale L.J. 1427, 1428-29 (1939) (noting that "the term 'visitorial powers' refers only to the authority to regulate and supervise banking practices, and that disclosure of information relating to national banks [to assess] truthful disclosure in registration statements . . . can hardly be charged with attempting to exercise visitorial powers.").

b. *This Court's precedent both explicitly affirms and operates in the shadow of the internal affairs understanding.* This Court's precedent echoes this limitation of the visitorial power to internal affairs. In *Union Pacific Railroad Co.*, the Court schematized the "legislative power of Congress" over "franchises" to all "fall under two heads":

> 1. Where municipal, charitable, religious, or eleemosynary corporations, public in their character, had abused their franchises, perverted the purpose of their organization, or misappropriated their funds, and as they, from the nature of their corporate functions, were more or less under government supervision, the Attor-

> ney-General proceeded against them to obtain correction of the abuse; or,
>
> 2. Where private corporations, chartered for definite and limited purposes, had exceeded their powers, and were restrained or enjoined in the same manner from the further violation of the limitation to which their powers were subject.

United States v. Union Pac. R.R. Co., 98 U.S. 569, 617-18 (1878). In short, this Court recognized that the visitorial power prevents either offenses against the charter or corporation actions in excess of the charter.

Similarly, in *Hale v. Henkel*, Justice Brewer repeatedly affirmed the limitation of visitorial powers to internal affairs. 201 U.S. 43 (1906) (Brewer, J., dissenting). In that case, the Court rejected a federal visitorial power over state corporations that nullifies the protections of the Fourth Amendment. Justice Brewer defined the visitorial power by remarking, uncontested by the opinion of the Court, that

> it is true that there is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a state has chartered it, the power is lodged in the state. If the nation, then in the nation; and it cannot be exercised by any other authority. It is in the nature of the power of visitation.

Id. at 86. After quoting Angell & Ames, Blackstone, and Kent for the same definitions of the visitorial power, Justice Brewer concluded that "[t]he right of

visitation is for the purpose of control and to see that the corporation keeps within the limits of its powers." *Id.* at 87.

Following *Hale*, in *Guthrie v. Harkness* this Court recognized that the right of an individual stockholder to inspect the books of his corporation was not visitorial. 199 U.S. 148 (1905). On its way to that holding, this Court approvingly quoted Bouvier's law dictionary, that visitation is "the act of examining into the affairs of a corporation." *Id.* at 157. Even more explicitly, this Court approvingly quoted a treatise on mandamus that "[v]isitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings." *Id.* at 158 (quoting Merrill on Mandamus). Finally, and relatedly, in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), this Court distinguished between the power to enforce a corporation's charter against itself and the power to enforce state laws, holding that the former was visitorial while the latter was not.

More recently, this Court acted consistently with this historical understanding of the visitorial power in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007). In that case, it was conceded by the parties, and accepted without argument by this Court, that Michigan's mortgage registration and inspection requirements were visitorial in nature, and thus preempted by the National Bank Act for, at least, national banks. *Id.* at 1568. The requirements by Michigan in that case went to the heart of the internal affairs of the bank subsidiary: they required registration and empowered the state to revoke registration.

Id. at 1566.[4] In essence, the state was conducting its own monitoring of the compliance of the subsidiary of the national bank with state-established charter requirements. Compliance with charter requirements, however, is the essence of the visitorial power.

Lower court precedent sounds a similar note. In *Allen v. McKean*, 1 F. Cas. 489, 498 (C.C.D. Me. 1833) (Story, Circuit Justice), for example, the court argued that the visitorial power is the "power to control and arrest abuses, and to enforce a due observance of the statutes of the charity." Similarly, in *First National Bank of Youngstown v. Hughes*, 6 F. 737, 740 (C.C.D. Ohio 1881), cited approvingly in *Guthrie*, 199 U.S. at 158, the court held that "visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner to conducting business, and enforce an observance of its [the corporation's] law and regulations."

c. Examples of court review of the visitorial power confirm the internal affairs understanding. Examples of exercises of the visitorial power provide the best method for understanding its scope and limits. In *State* ex rel. *McGill v. Cook*, 138 N.W. 432 (Minn. 1912), for example, the court rejected a challenge to an unincorporated association's action in violation of its by-laws on the ground that the state lacked visitorial power over unincorporated associations. In

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[4] They also required submission of annual reports, certain types of file-keeping, and inspections, all methods of the exercise of visitorial powers. *Watters*, 127 S. Ct. at 1566. See *infra*, Part I.B.2 (arguing that the methods of the exercise of a power do not determine the type of power).

reaching this result, it acknowledged the visitorial power of the state over violations of the by-laws of incorporated associations. In that case, the national organization Modern Woodsmen of America passed a resolution requiring higher membership fees. A local lodge of the Woodsmen voted to use its funds to advocate for repeal of this fee increase, but an official in the local lodge refused to appropriate the funds. The suit was brought to command appropriation. The court rejected the challenge:

> The law of this state applicable to the question is that a writ of mandamus will issue only to compel the performance by an inferior tribunal, corporation, board, or person of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Private domestic corporations and their officers are within this rule by virtue of the visitorial power of the state over them; but the writ does not lie to regulate the affairs of unincorporated societies or associations.

Id. at 434. It then ruled that the local lodge was an unincorporated association, beyond the power of the state. *Id.*

Similarly, in *Arbour v. Pittsburgh Produce Trade Ass'n*, 47 Wisc. 670 (1870), the court resolved a dispute over the by-laws of an incorporated trade association. The court removed the relevant by-laws, regarding sale on credit, from the enforcement action. It noted that "the visitorial or superintending power of the state over corporations created by the legislature will always be exercised, in proper cases,

through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises." *Id.* at 679-80. In both of these cases, courts demonstrated that the visitorial power restrains corporations from violating their charters. See *State* ex rel. *Waring v. Georgia Med. Soc'y*, 38 Ga. 608 (1869) (issuing mandamus to reinstate plaintiff into medical society because his expulsion violated corporation law); *Runkel v. Winemiller*, 4 H. & McH. 429 (Md. Gen. 1799) (same for minister and congregation); *State v. Milwaukee Chamber of Commerce*, 3 N.W. 760 (Wis. 1879) (declaring its power to review by-laws and procedures of corporation but upholding corporation's decision because of its compliance with those procedures); Angell & Ames, *supra*, at § 702, at 659-60 (collecting cases, *inter alia*, compelling swearing in of insurance director, restoring banking corporation directors, and admitting entitled members to trade association).

Courts also acted to prevent corporate behavior in excess of their charter. In *People* ex rel. *Attorney General v. Utica Insurance Co.*, 15 Johns. 358 (N.Y. Sup. 1818), for example, the court policed the boundaries of a corporation that lacked charter power to engage in banking. Similarly, in *Attorney General v. Tudor Ice Co.*, 104 Mass. 239 (1870), the Attorney General sued to enjoin a private corporation from engaging in business other than the ice trade, particularly trade in oil, tobacco, and other products. In *Venner v. Chicago City Railway Co.*, 92 N.E. 643, 647 (Ill. 1910), the court remarked that the visitorial power extended to corporate behavior beyond the charter such as "monopolies, unlawful combinations, and unreasonable exactions from corporations enjoying special franchises and privileges."

Finally, courts repeatedly affirmed the limitation of the visitorial power to internal affairs of the corporation in their refusal to exercise power. Most prominently, they rejected jurisdiction over shareholder's rights to inspect books, a common-law right not related to the visitorial power of the state over corporations. *Guthrie*, 199 U.S. at 158; Thompson, *supra*, § 476, at 581; Pound, *supra*, at 388. They also rejected claims that state regulation of branches was visitorial. *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924).

B. In Contrast, the New York Attorney General's Request for Information on Discriminatory Lending Does Not Involve Internal Affairs, Even if Its Method Is Similar to Methods of Exercising Visitorial Powers.

1. Discriminatory lending practices are not internal affairs.

The above discussion demonstrates that as a historical matter the visitorial power of states extended only to regulation of a corporation's internal affairs. Actions involving compliance with the procedural provisions of corporate charters or by-laws, suits to prevent corporation actions in excess of charters, and other similar proceedings constitute the core of the visitorial power. Other state laws, such as those involving common law shareholder's rights, for example, did not constitute an exercise of visitorial powers.

The New York Attorney General's information request does not involve internal affairs. On the contrary, the Attorney General's request relates to a particular bank practice that has nothing to do with the internal functioning of the bank as a corporation.

The Attorney General only requested information concerning mortgage polices and practices and data concerning loans related to real property. *Clearing House Ass'n v. Cuomo*, 510 F.3d 105, 109 (2d Cir. 2007).

2. The similarity between the Attorney General's method and common methods of exercising visitorial powers is inapposite.

To be sure, the methods of exercising the visitorial power are similar to the method employed by the New York Attorney General in this case. But this similarity is inapposite because the method of exercise of a power does not determine the source of that power. States routinely employed the methods in this case in ways that courts recognized were exercises of non-visitorial powers, such as the general police power, and they exercised other methods that courts recognized were exercises of the visitorial power. In short, similarity in method is a red herring because the nature of the power, not the method of its exercise, determines whether that power is visitorial or otherwise. The method of exercise is neither a necessary nor sufficient condition for the power's classification as visitorial.

The visitorial power, admittedly, was exercised through inspection of records and suits to enjoin practices. Thompson, *supra*, § 481, at 585 ("A state in the exercise of its visitorial power may, through its officers, call on corporations for information as to their business and the method of transacting it."); *id.* § 480, at 585 (referring to "the power which the state has to supervise by way of injunction"); *id.* § 486, at 588; Angell & Ames, § 684, at 636; Charles B. Elliott, *A Treatise on the Law of Private Corporations* § 90,

at 94 (Howard S. Abbott ed., 4th rev. ed. 1911); Pound, *supra*, at 374.

But other non-visitorial powers were also exercised through inspection of records and suits to enjoin practices. The police power provides the best example. Under the police power states are able to require the filing of reports for inspection. Thompson, *supra*, § 440, at 510 ("A familiar exercise of the police power of the state over corporations is found in the statues of most of the states requiring corporations at stated periods to make and file with some public officer of the state or county, reports of their business transactions and financial condition"); Elliot, *supra*, § 92, at 98 ("All private corporations may be required to make periodical reports of their capital, business and general condition to a state board or official."). States may also bring suit to procure such records if not filed. Thompson, *supra*, § 440, at 510; Elliot, *supra*, § 92, at 98. Thus, mere requirement of inspection of records does not make a state's action visitorial in nature.

States are also able to enjoin behavior contrary to the public interest pursuant to the police power; they need not rely on the visitorial power. The police power extends, "there is general agreement," to "the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals." Thompson, *supra*, § 421, at 480. One "method of the state's exercise of its police power is through its judicial department" and it was "generally, if not universally, conceded, that courts have jurisdiction to issue what have been termed prerogative writs, as well as the common-law and equitable writs, in proper actions against corporations . . . to prevent them from doing acts that are illegal or against public policy." *Id.* § 468, at 579. For example,

in *State v. Nelson Co.*, 45 N.W. 33 (N.D. 1890), the court issued an injunction to prevent the issuance of "seed-grain bonds." Thus, mere pursuit of action to prevent corporate behavior also does not make a state's action visitorial in nature.

The police power, of course, is a power different from the visitorial power, as its discussion in leading treatises demonstrates. Thompson on Corporations, for example, divides state control into the police power, Thompson, *supra*, §§ 420-468, at 478-579, and the visitorial power. Thompson, *supra*, §§ 475-486, at 580-88. Compare Elliott, *supra*, § 109, at 119 (discussing the visitorial power), with *id.* § 90, at 94 (discussing the police power). The police power itself applies to corporations. Thompson, *supra*, § 433, at 496 ("That the police power extends alike to individuals and corporations has been abundantly established."); Elliott, *supra*, § 109 at 119 ("Corporations, like individuals, are subject to the police power of the state.").[5]

Additionally, the visitorial power was exercised through methods other than inspection. Courts restored members, see Thompson, *supra*, § 480, at 583-84 (collecting cases); set aside contracts, see Elliott, *supra*, § 252, at 320-21, and performed other activities, see *id.* § 253, at 322 ("To entertain an action to dissolve a corporation, to determine the validity of its organization; to determine which of two rival organi-

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[5] Strictly speaking, of course, the visitorial power is a subset of the police power, see Thompson, *supra*, § 481, at 585 (referring to the visitorial power as a "branch of the police power"), but this does not undermine the argument that a state may regulate a corporation under the latter without invoking the former. *Id.* § 475, at 580-81 (contrasting police power as "passive, while visitorial power is active").

zations is the legal one, or who of rival claimants are its legal officers; to restrain it from declaring a dividends, or to compel it to make one; to restrain it from issuing its bonds, or from making an additional issue of stock – would clearly all be the exercise of visitorial powers or the corporation, or an interference with the management of its internal affairs.").

The foregoing analysis demonstrates that the method of the exercise of a power does not make that power visitorial. On the contrary, as the previous section indicated, the visitorial power is involved only when the state action supervises the internal affairs of the corporation. On that test, discriminatory lending regulation is a far cry from supervision of deviations from charter procedures and actions in excess of charter-granted powers.

3. *The affirmation of state escheat powers in § 484 is inapposite.*

The federal respondents argued in their brief in opposition, Brief for Federal Respondent in Opposition, at 13 n.4, that this internal affairs understanding of visitorial power is inconsistent with 12 U.S.C. § 484(b), which authorizes an exception on the prohibition on visitorial powers for states to "review" a bank's records "to ensure compliance with applicable State unclaimed property or escheat laws." The problem with this argument is that § 484(b) was added in 1982, in the context of congressional doubt regarding the ability of states to enforce their escheat laws. Pub. L. 97-320, 96 Stat. 1521 (Oct. 15, 1982). In this context, § 484(b) is an affirmation of the historical meaning of visitorial powers, not an attack on it.

As a Congressional Research Service Report on the topic summarizes, conflicting determinations of

this Court and the OCC created confusion as to a state's ability to enforce its escheat laws against national banks. Henry Cohen, *Escheat of Unclaimed Deposits in Financial Institutions*, Congressional Research Service (July 16, 1980). First, two decisions of this Court created an uncertain test for the survival of escheat laws. In *First National Bank of San Jose v. California*, 262 U.S. 366 (1922), this Court held that two California laws providing for escheat of unclaimed deposits to the state were invalid as applied to national banks. At the time, this decision provoked reactions by the states. See *Escheat of Unclaimed Moneys in National Banks: Hearing on S. 111 Before a Subcomm. of the Comm. on the Judiciary*, 68th Cong. 2 (1924) (statement of Hon. Frank M. Eastman, Special Deputy Att'y Gen. of Pennsylvania) (proposing a statutory fix and describing *San Jose* as enacting a sea change: in that case "the right of the several States to escheat unclaimed deposits in the hands of national banks, which right had heretofore been generally conceded, was denied").

A later decision of this Court, *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), undermined *San Jose* by upholding Kentucky's escheat law. But, as the Report notes, *Luckett* did not clarify the doctrine. Rather, it was still the case that "a state's reporting requirements [to enforce escheat laws] in a particular instance conceivably might be so burdensome as to interfere with a national bank's performance of its functions, in which case the requirements would be impermissible." Cohen, *supra*, at 8. States were still left both fearful and uncertain of their abilities.

The OCC's behavior exacerbated state concerns in this uncertain doctrinal world. The Report notes that the Comptroller of the Currency "'has vigorously

denied access to state officials' under 12 U.S.C. § 484." *Id.* at 8 n.5 (quoting Ralph J. Rohner, *Problems of Federalism in the Regulation of Consumer Financial Services Offered by Commercial Banks: Part I*, 29 Cath. U. L. Rev. 1, 39 (1979)). In short, as the Report summarized, state ability to enforce escheat laws was at best uncertain and at worst at a low ebb:

> State escheat laws are applicable to federally-chartered institutions, except that they may not infringe upon federal law or burden the functioning of a federally-chartered institution. This apparently also holds true for provisions in state escheat laws providing for bank examinations.

Cohen, *supra*, at 15.

In this context, interpreting the passage of § 484(b) to transform the well-established internal affairs meaning of the visitorial power would be inappropriate.[6] Rather, the new section modestly seeks to clarify a confused area of law, in effect reaffirming the historical internal affairs meaning of the visitorial power cast into doubt by this Court's conflicting interpretations and the aggressive behavior of the OCC.

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[6] Such an interpretation also would be finding an elephant in a mousehole, see *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes."), given the vast authority, as evidenced by the case and treatise citations in this brief, for the internal affairs understanding of the visitorial power.

The foregoing demonstrates that the historical meaning of visitorial power is the state's control of the internal affairs of a corporation. That power – forbidden by § 484(a) – is not implicated by the New York Attorney General's investigation, which involves discrimination, not corporate internal management.

II. THE STATE OF NEW YORK'S ENFORCEMENT ACTIONS DO NOT IMPLICATE THE POLICY MOTIVATIONS UNDERLYING THE PROHIBITION ON STATE EXERCISE OF VISITORIAL POWERS.

A. Preemption of State Visitorial Powers Is Justifiable to the Extent that State Banking Regulations Externalize Costs to Consumers in Other States and Undermine Federal Banking Regulation.

The historical meaning of "visitorial powers" emphasizes oversight of the internal affairs of a corporation and not merely regulation of its operations. The historical distinction between visitorial powers and non-visitorial regulation maps neatly onto the policy rationale underlying the NBA's preemption clause. State exercise of truly visitorial authority gives rise to a specific class of economic difficulties, externalities, that non-visitorial regulation does not. As historically understood, the exercise of visitorial power necessarily affects the bank as a whole, with impact on the bank's operations beyond the borders of the regulating state engaged in regulation. While the regulating state may enjoy the local benefits of such visitorial oversight, the costs may be spread nationally to states that do not benefit from the regulatory regime. There are sound reasons grounded in

economic theory for preempting state exercise to avoid the externality problem, but these concerns are not implicated when a state seeks simply to regulate lending activity within its borders, a type of regulation that the framers of the NBA would not have understood as visitorial.

The policy rationale behind federal preemption of state visitorial powers is the same as the general justification for federal preemption of state law. Preemption allows the federal government to achieve uniformity of laws and regulations, which in turn limits the negative effects of diverse or divergent state laws and regulations, in particular negative externalities that occur when regulation in one state has costs that are borne by residents of other states. Defined generally, negative externalities are costs pushed from parties to a transaction onto nonparties. Since the parties to the transaction ignore these costs they are said to be "externalized" on other nontransacting parties. See A.C. Pigou, *Economics of Welfare* (MacMillan & Co., 1920). Externalities represent a form of market failure, invoked to justify regulation to ensure that parties internalize the costs of their transactions.

Federal preemption of state law is a means of minimizing or mitigating the externalities posed by decentralized regulation among states. In environmental law, state regulations may be ineffective in controlling pollution externalities that burden other states. At worst, state regulations may shift costs onto neighboring states entirely. See David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Cal. L. Rev. 1125, 1189-90 (1999). Since federal legislators incorporate the costs of nationwide regulation, preemption can mitigate

the externalities produced by a patchwork of state regulations.

Preemption also can address the burden on commercial parties seeking to comply with a wide array of state regulations. Without a uniform standard, individual states can internalize the benefits of laws and regulations tailored to their political needs and shift the costs of compliance to commercial parties doing business in each state. If an individual state's regulatory burden on manufacturers is higher than other states, prices nationwide may rise, creating an externality on consumers living in states with lower standards. The economic case is strongest when state regulations pose externalities by forcing compliance above and beyond that demanded by either competing state laws or national regulatory standards. As the Second Circuit explained, the presumption against preemption "'disappears' in the context of national banking regulation, which has been 'substantially occupied by federal authority for an extended period of time.'" *Clearing House Ass'n*, 510 F.3d at 113 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2d Cir. 2005)).

This economic rationale underlies Congress's intent to allow preemption of state visitorial powers over national banks. State laws regulating national banks with operating subsidiaries across the country can pose a significant source of externalities on the financial services in other states. Advocates from the banking industry express the concern that diverse state and local laws might lead to "higher operating costs and higher prices for financial services; and at worst to reduction of available credit and fewer product options." Vincent Di Lorenzo, *Federalism, Consumer Protection and Regulatory Preemption: A Case for Heightened Judicial Review*, 10 U. Pa. J.

Lab. & Emp. L. 273, 300 n.116 (2008). Since banks operate across jurisdictions, compliance with the "myriad of state laws" can hamper competition and favor locally operating banks over their national rivals. *Id.*

Sensitive to the ability of state regulations to threaten or unbalance existing national bank regulations, the National Banking Act provides that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law." 12 U.S.C. § 484(a) (2000). Though this Court in *Watters* upheld the OCC's interpretation of the NBA as covering bank subsidiaries, the underlying policy rationale for preemption of state visitorial powers remains that

> States are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers. But when state prescriptions significantly impair the exercise of authority, enumerated or incidental under the NBA, the State's regulations must give way.

Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1567 (2007); see *Barnett Bank of Marion County, N. A. v. Nelson*, 517 U.S. 25, 32 (1996).

The Court in *Watters* delineated the proper scope of state flexibility to regulate national banks, only permitting regulations or laws that do not unduly burden bank functions or discriminate against federal laws. The goal of avoiding externalities stemming from state regulation of national banks is at the heart of this balance. Preemption of state banking

regulations is most defensible when such regulation poses substantial externalities and disrupts uniform national standards, but the scope of the OCC's preemptive authority is not unlimited. If a state regulation's costs are limited to its jurisdiction, the key policy argument underlying the preemption of the state exercise of visitorial powers disappears. New York's enforcement of fair lending laws is precisely the type of highly localized, consumer-oriented regulation that should not be preempted.

B. State Enforcement of Fair Lending Laws In Mortgage Origination by National Banks Will Generate Costs and Benefits Only Within the State and Does Not Threaten To Create External Costs.

State enforcement of fair lending laws does not run afoul of the policies that motivate the NBA's prohibition on the exercise of visitorial powers. New York does not seek to regulate national banks as corporate entities in the traditional sense of "visitorial powers," but seeks only to regulate one aspect of the banks' local operations. Mortgage origination is a highly localized activity with prices set at the level of individual loans. Any costs attendant to compliance with the state's enforcement efforts will be borne solely by residents of New York, and not by the banks' customers in other states. Because the residents of New York will fully internalize the effects of the regulations adopted by the State, the OCC's attempted preemption has no foundation in the policy underlying federal preemption of visitorial powers. "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipolone v. Ligget Group, Inc.*, 505 U.S. 504, 516 (1992). The OCC's unwar-

ranted expansion of federal preemption should be rejected.

In attempting to investigate discriminatory lending practices, the State of New York is responding to data which show that racial minorities are more likely to receive expensive "subprime" mortgages than others of similar credit quality. See William Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in *The Geography of Opportunity* 101 (Xavier de Souza Briggs, ed. 2005). These subprime mortgages are more likely to result in foreclosure than other loans, with adverse effects on property values and the quality of neighborhoods within the state. New York therefore has a profound interest in the nature of mortgages written against real estate within the state.

While New York will benefit from regulating discrimination in the origination of high-risk mortgages within its borders, it is clear that any costs attendant to this regulation will fall on residents of the state as well. Mortgage origination is an inherently individualized activity, requiring attention to the particular borrower seeking a loan. See 12 C.F.R. pt. 30, App. A (2001) (describing the standards for prudent underwriting of mortgages). Though technology has simplified mortgage underwriting, it is still the case that originating a loan and determining the appropriate interest rate involves close attention to the borrowers' financial condition, the value of a parcel of real estate, and the prospects of the local real estate market. See Annand K. Bhattacharya et al., *An Overview of Mortgages and the Mortgage Market*, in *The Handbook of Mortgage Backed Securities* 17-27 (Frank J. Fabozzi ed., 6th ed., 2005). Because banks originate and price mortgages individually, there can

be no concern that antidiscrimination regulation imposed on mortgage origination practices in New York would impact mortgage origination in any other state. If New York's enforcement efforts increase the costs of taking mortgage applications in New York, these costs can readily incorporated into the price of the mortgages originated in the state. Because the fair lending regulations apply to *all* originators, see 15 U.S.C. § 1691(a), all lenders will bear such costs and compliance will not render national banks uncompetitive within the state.

The critical distinction between regulation of local mortgage origination and the regulation of national banks themselves is aptly demonstrated by contrasting New York's antidiscrimination measures with the regulatory regime rejected in *Watters*, 127 S. Ct. at 1568. Enforcement of broadly applicable fair lending legislation stands in sharp contrast with the extensive state regulation of mortgage originators rejected in *Watters*. In that case, Michigan sought to subject a mortgage originator to a comprehensive registration and regulatory regime in a manner sure to generate spillover effects in other states. In fact, the State of Michigan did not even challenge the classification of the powers exercised by the Office of Insurance and Financial Services as visitorial in nature. *Watters*, 127 S. Ct. at 1568. For example, the regulations in question in *Watters* included minimum net worth requirements for originators, and prescribed the means by which net worth is computed. Mich. Comp. Laws Ann. § 445.1655 (West 2002). A minimum net worth requirement necessarily impacts the mortgage originator as a firm; it is not possible for a single national originator to maintain a different financial structure in different states. Because regulations requiring a particular net worth affect

the financial structure of the entire firm, they inevitably have impact beyond a state's borders. The state requirement effectively displaces any federal minimum, or a federal policy of adopting no such requirement. The comprehensive regulation at stake in *Watters* therefore gives rise to the problems that the prohibition on visitorial powers was designed to address.

By contrast, New York's efforts to enforce federal antidiscrimination laws do not affect the mortgage originator as a firm. If a national bank must take extra care in originating New York mortgages, this does not impact the structure of the bank with adverse effects in other states, but simply affects the firm's operations in New York. Fair lending laws are much closer in this respect to usury regulations that have historically been reserved to the states. 12 U.S.C. § 85 (2000). Like fair lending regulations, and unlike the regulation at stake in *Watters*, usury laws regulate the origination of loans, but impose no direct requirements on the corporate entity engaged in lending. As such, neither usury laws nor fair lending regulations "significantly burden a national bank's own exercise of its real estate lending power." *Watters*, 127 S. Ct. at 1567. Usury laws themselves, are simply a subset of "general state laws," *McClellan v. Chipman*, 164 U.S. 347, 357 (1896), including contract, tort, and mundane laws such as zoning restrictions, which are never preempted unless they "expressly conflict with the laws of the United States, or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them." *Id.*

Enforcing antidiscrimination measures with respect to *locally* originated mortgages does not implicate the policy concerns that undergird federal

preemption of visitorial powers. It is notable in this context that New York State does not seek to investigate discriminatory lending patterns across the entire geographical range in which banks do business, but only with respect to loans originated within the state. The former case would be far more concerning, since New York would be seeking to regulate the entire bank and not simply the banks' New York operations. Such geographically wide-ranging regulation would impact the bank's operations in other states, and potentially give rise to the externalities that undergird Congress's preemption policy. By limiting its inquiries to the bank' operations within the state, and making no requirements on the corporate or financial structure of the banks, New York avoids any concern of externality problems.

Finally, any residual concerns about antidiscrimination measures giving rise to a patchwork of regulations should be allayed in light of the fact that the racially discriminatory lending practices that New York seeks to investigate are a violation of federal law. 15 U.S.C. § 1691 (2000). State enforcement of federal antidiscrimination regulations does not create a risk of preventing national banks "from operating in the manner authorized under Federal law," 69 Fed. Reg. 1908 (2004), or of creating a patchwork of "multiple . . . often unpredictable, different state . . . restriction." *Id.* Thus, the most important motivation for the proscription against visitorial powers is simply inapposite in this case.

Because the residents of New York State bear the cost of foreclosures and financial distress arising out of abusive, discriminatory lending practices, and because they alone bear the increased costs should the state undertake measures that are excessively "costly and burdensome," 69 Fed. Reg. 1908 (2004),

the State of New York is best situated to strike the appropriate balance. These powers are not "visitorial" as understood historically, and they raise none of the concerns about costly externalities which underlie Congress's policy of preempting visitorial powers under the National Bank Act. The OCC should not be permitted to undermine the State of New York's legitimate role in protecting its residents against lending abuses based on an overly broad reading of the meaning of "visitorial powers."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2009

AMICUS CURIAE BRIEF

No. 08-453

In the Supreme Court of the United States

ANDREW M. CUOMO, in his Official Capacity as Attorney General for the State of New York

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C. and OFFICE OF THE COMPTROLLER OF THE CURRENCY

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE FINANCIAL SERVICES ROUNDTABLE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Financial Services Roundtable represents 100 of the largest integrated financial services companies that provide banking, insurance, and investment products and services to American consumers.[1] Roundtable member companies account directly for more than 2.3 million jobs and more than $85.5 trillion in managed assets. Many of the Roundtable's members have national bank subsidiaries that have a direct interest in the uniform enforcement of applicable law with respect to their banking activities by the Office of the Comptroller of the Currency ("OCC"). For these reasons, the Financial Services Roundtable is filing this brief as an *amicus curiae* to urge the Court to affirm the judgment of the Second Circuit.

SUMMARY OF ARGUMENT

Congress has granted the OCC exclusive "visitorial powers" over national banks pursuant to 12 U.S.C. § 484(a). If New York's actions constitute visitation for purposes of Section 484(a), they are barred by federal law unless one of the exceptions to Section 484 applies.

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[1] Pursuant to this Court's Rule 37.6, The Financial Services Roundtable states that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than The Financial Services Roundtable, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from Petitioner and Respondents consenting to the filing of this brief have been lodged with the Clerk.

Petitioner and his amici attempt to redefine the historical meaning of "visitorial powers" to exclude Petitioner's actions in this case. Because Petitioner seeks to exercise wide-ranging examination and enforcement authority over national banks, the only way in which Petitioner and his amici can square their position with the language of Section 484 is to argue that the phrase "visitorial powers" in Section 484 is limited to policing national banks' adherence to their corporate charters and bylaws. *See* Pet. Br. 25; Br. of Connecticut Fair Housing Center ("CFHC Br.") 5-6. This cramped "internal affairs" reading of "visitation" finds no basis in the text, structure or history of the National Bank Act. Nor does it find support in the common law history of visitation over civil corporations. The historical evidence shows that the government, as visitor of civil corporations, is authorized to correct all misbehaviors of the corporation relating to public wrongs. Such state visitation—including Petitioner's conduct in this case—is precluded by Section 484.

ARGUMENT

To protect national banks against potentially hostile state actions, the National Bank Act establishes national banks as "National favorites" and shields them from "the hazard of unfriendly legislation by the States." *Tiffany* v. *Nat'l Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1873). Under the National Bank Act, "the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is 'an abuse, because it is the usurpation of power which a single

State cannot give.'" *Farmers' & Mechanics Nat'l Bank* v. *Dearing*, 91 U.S. 29, 34 (1875) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430 (1819)).

The limitation on visitorial powers in Section 484 is one of the provisions enacted by Congress in 1864 to shield national banks from state control. Congress was aware of the earlier history of state hostility to the First and Second Banks of the United States, and it was foreseeable that new frictions would arise from the new national bank system.[2] This history, which is reflected in the text and structure of the National Bank Act, refutes the argument by Petitioner and his amici that the phrase "visitorial powers" in Section 484 is limited to supervising the "internal affairs" of national banks. *See* Pet. Br. 24-25; CFHC Br. 6-25. Petitioner's argument is also contrary to the common-law history of public visitation of civil corporations.

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[2] *See, e.g.*, Cong. Globe, 38th Cong., 1st Sess. 1893 (Apr. 27, 1864) (statement of Sen. Sumner) (comparing potentially hostile use of state laws against national banks to the Maryland tax invalidated by the Court in *McCulloch*).

I. THE GRANT OF EXCLUSIVE VISITORIAL POWERS IN SECTION 484, VIEWED IN THE CONTEXT OF THE OCC'S BROAD AUTHORITY UNDER FEDERAL LAW, ENCOMPASSES THE ENFORCEMENT OF APPLICABLE LAWS AGAINST NATIONAL BANKS.

Congress's grant of exclusive visitorial powers to the OCC in 12 U.S.C. § 484(a) does not exist in a statutory vacuum. Section 484 is part of an integrated set of congressional enactments that collectively constitute a "full and complete provision" of authority to the OCC. *Guthrie v. Harkness*, 199 U.S. 148, 159 (1905). Congress has granted the OCC comprehensive authority to supervise and examine national banks and to enforce applicable federal and state laws and regulations. The text of these provisions, as well as the structure and history of Section 484(a) itself, make clear that the OCC's visitorial powers include authority to examine national banks for possible violations of applicable state laws and to enforce applicable state laws against national banks if violations are found.

A. The OCC Has Broad Authority Under Federal Law To Examine, Require Reports From, And Enforce Applicable Laws Against National Banks.

The National Bank Act grants the OCC broad authority to require reports from national banks, to examine all bank activities, and to enforce any applicable law against national banks and

institution-affiliated parties. The relevant provisions of the National Bank Act include not only an affirmative grant of visitorial powers enacted contemporaneously with Section 484(a), but also additional exclusive enforcement authority that Congress has conferred on the OCC in the ensuing 150 years. The relevant statutory provisions include the following:

- **12 U.S.C. § 161.** This provision, enacted in 1864 along with Section 484(a) as part of the National Bank Act, provides that "[e]very association shall make reports of condition . . . " to the OCC. Section 161 also grants the Comptroller authority to require any additional reports "necessary for his use in the performance of his supervisory duties." *Id.* The OCC is required to obtain "not less than four reports during each year" from national banks regarding their relations with affiliates. *Id.*

- **12 U.S.C. § 481.** This provision, also enacted at the same time as Section 484(a), grants the OCC the "power to make a thorough examination of all the affairs of the [national] bank" and its affiliates.

- **12 U.S.C. § 93.** This provision, which also dates back to 1864, authorizes the OCC to take action against national banks and institution-affiliated parties if there is a "knowing[]" "violat[ion of] any of the provisions" of the National Bank Act.

- **12 U.S.C. § 1818(b)(1).** This provision, enacted in 1966, adds to the OCC's powers by granting the agency authority to bring administrative cease and desist proceedings against any national bank or institution-affiliated party for violating any "law, rule, or regulation," including applicable state laws, rules and regulations.

- **12 U.S.C. § 36(f)(1)(B).** This provision, enacted in 1994, expressly provides that "[t]he provisions of any State law to which a branch of a national bank is subject . . . shall be enforced, with respect to such branch by the Comptroller of the Currency." By its terms, this provision makes the OCC the exclusive enforcer of non-preempted state law as to national bank branches outside their home states, including specifically, OCC enforcement of applicable state fair lending laws. *See id.* § 36(f)(1)(A).

Collectively, these federal statutory provisions provide the OCC with comprehensive visitorial authority over all national bank activities, including authority to enforce applicable federal and state laws against national banks and institution-affiliated parties. It is this comprehensive visitorial authority that Congress consistently has sought to protect from state intrusion.

B. The Structure And History Of Section 484(a) Confirm That The OCC's Exclusive Visitorial Powers Encompass Enforcement Of All Applicable Laws.

Petitioner's narrow "internal affairs" reading of the visitorial powers described in Section 484(a) would render the exceptions in Section 484 superfluous, contrary to a well-established principle of statutory interpretation. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("We construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

For instance, Section 484(b) provides: "*Notwithstanding subsection (a) of this section*," States are authorized to "review [a national bank's] records" "solely to ensure compliance with applicable State unclaimed property or escheat laws." (Emphasis added). Under Petitioner's "internal affairs" reading of Section 484(a), a state official's examination and enforcement of applicable escheat law would not be "visitation" at all because it deals with the national bank's external affairs. Thus, under Petitioner's proposed interpretation, Section 484(b) is surplusage.

Likewise, the exception to the OCC's exclusive visitorial powers for congressional committees set forth in Section 484(a) does not relate solely to the inspection of national banks' internal affairs. The history of this provision confirms that Congress understood the OCC's visitorial powers to extend to external as well as internal affairs. The exception

for congressional committees was enacted in 1913 to overcome objections that Section 484 barred Congress from requesting information directly from a national bank relating to national banks' *external* activities – specifically, allegations that national banks were engaged in collusive and risky "money trust" behavior. *See Hearings Before the Senate Comm. on Banking and Currency*, 63d Cong., 1st Sess. 1322 (1913) (testimony of Mr. Untermyer, Counsel to the Senate Committee on Banking and Currency).[3] Congress amended Section 484(a) after Attorney General Wickersham issued an opinion concluding that, while the OCC was authorized to

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[3] *See also id.*:

> "We found in the Pujo inquiry [into "money trust" activities of banks] that when the committee wanted to find out about the conduct of the banks, the loans to officers and other abuses, for the purpose of determining what legislation should be suggested by way of amendment to the banking laws, they were met by the bankers with the objection that the Comptroller of the Currency is the only officer of the Government who is subject to no sort of restriction whatever; that Congress, it was said, had delegated the visitorial power over its own regulation of the banks to the Comptroller of the Currency, and had no longer any power to investigate its own creatures. That is the extraordinary situation created by that provision [§ 484] of the banking law. The visitorial power over the banks is vested solely in the Comptroller of the Currency, and Congress can not investigate the banks and find out what they are doing as a basis for remedial legislation. My suggestion is that that amendment which passed the House at the last session should be inserted here on page 20 of the bill, so that if the Congress wants to examine into the powers of its own creation it may be permitted to do so. The present situation is intolerable."

gather the information at issue for its own purposes, Congress could not direct the OCC to gather the information for congressional purposes. *See* 29 Op. Atty. Gen. 555 (Nov. 9, 1912).

Petitioner's "internal affairs" interpretation of visitorial powers converts the exceptions in Section 484 into surplusage. Petitioner's interpretation thus violates the basic principle that courts should give effect to all the provisions of a statute if it is fairly possible to do so.

C. This Court's Cases Confirm That The OCC's Exclusive Visitorial Authority Reaches Enforcement Of All Applicable Laws.

This Court has construed the scope of 12 U.S.C. § 484(a) in two prior cases. In *Guthrie v. Harkness*, 199 U.S. 148, 157 (1905), the Court described visitation as "'[t]he act of examining into the affairs of a corporation,'" *id.* (quoting 2 *Bouvier's Law Dictionary* 1199 (6th ed. 1856)), and "the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance to its laws and regulations," *id.* at 158. In doing so, the Court noted that the term "visitation" "mean[s] 'inspection; superintendence; direction; regulation." *Id.* (quoting *First National Bank v. Hughes*, 6 Fed. Cas. 737 (1881)). *See also id.* ("Visitors of corporations" are authorized "to correct all abuses of authority, and to nullify all irregular proceedings.") (quoting S.S. Merrill, *Law of Mandamus* § 175, at 213 (1892)). The Court explained that "visitation [is] a public

right, existing in the state for the purpose of examining into the conduct of the corporation with a view to keeping it within its legal powers . . . ." *Id.* at 158-59. In addition, the Court observed that "Congress had in mind, in passing [Section 484], that in other sections of the law it had made a full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him . . . . It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation." *Id.* at 159. *See also* Part I.A, above.

More recently, this Court considered Section 484(a) in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007). In *Watters*, the Court addressed whether Michigan could exercise "general supervision and control" over a national bank operating subsidiary, including authority "to investigate consumer complaints and take enforcement action if [the state official] finds that a complaint is not 'being adequately pursued by the appropriate federal regulatory authority.'" 550 U.S. at 8 (quoting Mich. Comp. Laws Ann. § 445.1663(2)). The Michigan laws at issue in *Watters* expressly provided for enforcement by the state Attorney General. *See* Mich. Comp. Laws Ann. § 445.1661.

In *Watters*, the Court defined "visitation" by quoting from both *Guthrie* and the OCC's visitorial

powers regulation, 12 C.F.R. § 7.4000(a)(2)(2006).[4] *See* 550 U.S. at 13-16. Based on this definition, the Court stated that "Michigan, therefore, cannot confer on its commissioner examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15.

The Court held that the National Bank Act "spare[s] a national bank from state controls of the kind here involved." *Id.* at 13. The Court's opinion in *Watters* observes that "State laws that . . . subjected such lending to the State's investigative and enforcement machinery would surely interfere with the banks' federally authorized business: National banks would be subject to registration, inspection, and enforcement regimes imposed not just by Michigan, but by all States in which the banks operate. Diverse and duplicative superintendence of national banks' engagement in the business of banking, we observed over a century ago, is precisely what the [National Bank Act] was designed to prevent." *Id.* at 13-14

The Court's decision in *Watters* would be devoid of meaning under an "internal affairs" construction of Section 484(a)'s "visitorial powers." *Watters* arose from the efforts of state regulators to enforce state

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[4] The OCC's regulation defines "visitorial power" as: "'(i) [e]xamination of a bank; (ii) [i]nspection of a bank's books and records; (iii) [r]egulation and supervision of activities authorized or permitted pursuant to federal banking law; and (iv) [e]nforcing compliance with any applicable federal or state laws concerning those activities.'" 550 U.S. at 14, quoting 12 C.F.R. § 7.4000(a)(2) (2006).

laws. There was no contention in *Watters* that the operating subsidiaries had violated their corporate charters or bylaws. Indeed, in *Watters*, it was understood that the *state*, not the OCC, would regulate the "internal governance" of operating subsidiaries, which are *state-chartered* corporations. 550 U.S. at 21.[5]

This Court's decisions, therefore, squarely reject the narrow view of visitation propsed by Petitioner and his amici.[6]

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[5] Petitioner's narrow interpretation of visitorial powers cannot be squared with this Court's use of that term in *Watters*. As the Court there observed, the corporate governance of the North Carolina-chartered corporation at issue in *Watters* was controlled by the law of North Carolina. *See id.* at 21. Under Petitioner's theory, the only state that could exercise "visitorial" authority over that corporation would be North Carolina, not Michigan. CFHC Br. 24 n.8. Yet the Court's opinion and the dissenting opinion in *Watters* both described the application of Michigan's statutes to the North Carolina corporation as "visitorial." *See id.* at 14-15; *id.* at 34-35 (Stevens, J., dissenting).

[6] Neither *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), nor *First Nat'l Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), addressed Section 484. In both cases, courts exercised their equitable powers to review administrative actions of a federal agency construing the powers of national banks. This Court has instructed that such equitable remedies must be reevaluated in light of the expanded availability of legal remedies for administrative action, including judicial review pursuant to the Declaratory Judgment Act and the Administrative Procedure Act. As this Court explained in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 509 (1959), "[s]ince in the federal courts equity has always acted only when legal remedies were inadequate, the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity. Thus, the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because subsequently a legal remedy becomes available, must be re-
(...continued)

II. THE HISTORY OF PUBLIC VISITATION OF CIVIL CORPORATIONS CONFIRMS THAT THE PHRASE "VISITORIAL POWERS" IN SECTION 484 INCLUDES AUTHORITY TO ENFORCE APPLICABLE FEDERAL AND STATE LAWS AGAINST NATIONAL BANKS.

The history of public visitation of civil corporations confirms that Petitioner's narrow reading of visitation is incorrect. Petitioner and his amici confuse *private* visitation of charities and ecclesiastical institutions with *public* visitation of civil corporations. Public visitation of civil corporations, rather than private visitation of charities and ecclesiastical institutions, provides a more appropriate historical analog to the OCC's

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evaluated in the light of the liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action. Similarly the need for, and therefore, the availability of such equitable remedies as Bills of Peace, Quia Timet and Injunction must be reconsidered in view of the existence of the Declaratory Judgment Act as well as the liberal joinder provision of the Rules."

The equitable review and remedies accorded to the states in *St. Louis* and *Bay City* are no longer warranted given the dramatic expansion of judicial review of agency actions via the Declaratory Judgment Act and the APA, as well as the waiver of sovereign immunity accorded in section 706 of the APA to allow such actions to be brought directly against the agency itself rather than the national bank. *Compare* OCC Final Rule, 69 Fed. Reg. 1895, 1899 ("The principal means in use today for testing the application of state law to national banks – declaratory judgment – was unavailable to the states prior to the enactment of the Declaratory Judgment Act . . . . If this type of action had been available at the time of the *St. Louis* case, there would have been no need for the state to bring a *quo warranto* action.").

visitation of national banks. Petitioner's analogy to private visitation erroneously narrows the scope of the OCC's exclusive visitorial powers.

A. Early Scholarship Confirms That Public Visitation Over Civil Corporations Extends To Their External Activities.

In advancing their "historical" argument that visitation is limited to an institution's internal affairs, Petitioner and his amici omit any reference to the most influential of all common law treatises, that of Sir William Blackstone. Blackstone confirms that the sovereign's "visitation" of civil corporations extends to correcting "all misbehaviours" of the corporation:

> The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where, and where only, *all misbehaviours* of this kind of corporations are enquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, *according to the rules of the common law*, they ought not to be visited elsewhere, or by any other authority.

1 William Blackstone, *Commentaries on the Laws of England* *469 (1765) (emphasis added). *See also* 2 James Kent, *Commentaries on American Law* 241 (1827) ("visitation of civil corporations is by the government itself, through the medium of the courts of justice.").[7]

Dean Pound similarly concludes that visitorial jurisdiction "lies to compel domestic corporations or their officers to perform specific duties incumbent on them by reason of their charters, *or under statutes or ordinances or imposed by the common law.*" Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 375 (1936) (emphasis added, footnote omitted). Petitioner simply ignores this statement by Dean Pound. One of Petitioner's amici quotes part of the statement, but inserts a period in place of the language quoted in italics above and cites Dean Pound in support of the proposition that "Leading treatises affirm the internal affairs understanding [of visitorial powers]." CFHC Br. 11-12. As the full quotation shows, Dean Pound's article not only fails to support the "internal affairs" interpretation, but refutes that interpretation.[8]

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[7] In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Court concluded that Dartmouth College was a private eleemosynary institution. Justice Story cited and relied on Blackstone for the proposition that there is "a power to visit, inquire into, and correct *all* irregularities and abuses in such corporations." *Id.* at 674 (opinion of Story, J., citing 1 Blackstone's *Commentaries* 480 (emphasis added)).

[8] Early treatise writers recognized that certain regulated industries – including railroads and banking – became subject to comprehensive "visitatorial powers" by governmental (...continued)

B. Contemporary Case Law Likewise Shows That Public Visitation Over Civil Corporations By The Sovereign Includes The Authority To Correct Public Wrongs.

In what Dean Pound called "the leading case for visitatorial powers in equity," Pound, *supra*, at 380, *Attorney General v. Chicago and Northwestern Rwy. Co.*, 35 Wis. 425 (1874) (hereinafter the "*Railway Companies*" case), the Wisconsin Supreme Court reviewed American and English law over the first half of the Nineteenth Century and concluded that equity jurisdiction had evolved to permit state attorneys general to go to court to correct public wrongs, not solely to police a corporation's internal affairs.

In the course of reviewing the state attorney general's authority to bring suit against the companies, the court found that "the authority of the English chancery to restrain corporate violations injuring or tending to injure public welfare, or to defeat public policy, at the suit of the attorney general . . . is now beyond controversy." 35 Wis. at 529. The court continued: "The grounds on which

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"visitors" or "regulators" as the law of visitation developed in the mid-Nineteenth Century. *See* 1 Seymour D. Thompson, *Commentaries on the Law of Private Corporations* 529 (2d ed. 1908) ("The United States, through the action of [C]ongress, and perhaps a majority of the states, through their legislatures, have provided [railroad] commissions, and invested them with a visitorial power, and have given them almost unlimited authority in the regulation and control of these corporations."); *id.* at 556 (power "exercised by congress and the several states, extends to the minutest details of the banking business.").

this jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import." *Id.* at 530.

The sole citation by Petitioner or his amici to "th[is] leading case for visitatorial powers in equity," Pound, *supra*, at 380, is a fleeting parenthetical description in one amicus brief describing the case as "upholding visitorial power of the Attorney General to proceed for corporation violation of charter." CFHC Br. 9. Such a description is, at best, incomplete and, for present purposes, inaccurate.

The *Railway Companies* case found that the attorney general "appl[ies] for the writ on behalf of the public," 35 Wis. at 531, "to correct abuses and save the rights of the people," *Id.* at 572. The court confirmed that the state attorney general's visitorial authority included enforcement of generally applicable laws against corporations: "We have held that here is positive violation of positive public law to positive public injury, and that we have jurisdiction of this writ, as a prerogative writ, to restrain it." *Id.* at 595.

The *remedy* the state attorney general sought in the *Railway Companies* case was forfeiture of the companies' charters, but that does not change the nature of the *violation* that the state attorney general sought to correct. The *Railway Companies* case dealt with whether the corporations had violated state-mandated "maximum rates," *id.* at

553, which is a matter concerning the companies' *external* activities.

In *Attorney General v. Albion Academy*, 52 Wis. 391 (1881), the Wisconsin Supreme Court confirmed that "the *Railway Companies* doctrine" provides that the state attorney general has authority to police public wrongs. *See id.* at 394 ("the attorney general may sue in respect to the *public* injury, although a private person may also sue in respect to his *private* injury"). The opinion makes clear that Albion Academy was a private for-profit corporation, and therefore was subject to public visitation via the attorney general for public wrongs. *See infra* Part II.C.[9]

These cases further undermine Petitioner's argument that, as a matter of historical practice, visitation of civil corporations was limited to the corporation's internal affairs.

C. The Court Should Reject Petitioner's Attempt To Confuse Public And Private Visitation.

If the Court addresses the common-law meaning of "visitation," it should decline Petitioner's invitation to conflate *private visitation* of charities and ecclesiastical institutions with *public visitation*

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[9] The court held that the corporate violation at issue in *Albion* – the illegal issuance of corporate shares in violation of the corporation's charter – was not a public wrong and therefore was outside the attorney general's visitorial authority. *See id.* at 395.

of civil corporations. *See* Pet. Br. 25; *see also* CFHC Br. 5-6. Private visitation addressed the internal affairs of an institution, while public visitation is designed to "to take care of the public interest."

It bears noting that "[c]orporations were rare before 1800; hence the case law on corporations was thin before the nineteenth century. As corporations multiplied, so did litigation over rights and duties. For all practical purposes, the courts created a body of corporation law out of next to nothing." Lawrence Friedman, "A History of American Law," *in The Business Corporation* 137 (3d ed. 2005). Petitioner and his amici nevertheless cite and rely on "[o]ld decisions and doctrines, from the time when most corporations were academies, churches, charities, and cities," even though these decisions have "little to say about managers and directors that was germane to the world of business corporations." *Id.* After 1800, "the courts slowly built up a body of rules about the internal life of corporations, and the relationships between corporations and the outside world." *Id.* at 138.

As early as 1829, Kent's *Commentaries on American Law* recognized that

> [t]here is a marked and very essential difference between civil and eleemosynary corporations on this point of visitation. . . . Civil corporations, whether public, as the corporations of towns and cities; or private, as bank, insurance, manufacturing, and other companies of the like nature, are not subject to this [private] species of visitation. They are

> subject to the general law of the land, and amenable to the judicial tribunals for the exercise and the abuse of their powers.

Kent, *supra*, at 244.

Early corporate law treatises similarly drew a distinction between public visitation of civil corporations and private visitation of charitable institutions:

> Civil corporations, whether public or private, being created for public use and advantage, properly fall under the superintendency of that sovereign power whose duty it is to take care of the public interest; whereas, corporations, whose object is the distribution of a private benefaction, may well find jealous guardians in the zeal or vanity of the founder, his heirs or appointees.

Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations*, § 684, at 680 (4th ed. 1852) (footnotes omitted).

Another treatise writer explained that public visitation is generally equivalent to the state's prosecutorial powers over individuals:

> § 90. **Visitorial Power** . . . . The present power of control over corporations is founded more on grounds of public policy than on any theory of succession to the rights of a prehistoric founder. *As a general rule, the state has the same control, in this regard, over corporations that it has over individuals.*

Charles B. Elliott, *A Treatise on the Law of Private Corporations* § 90, at 80 (3d ed. 1900) (emphasis added). *See also* Thompson, *supra*, at 580 ("In its visitorial capacity the state checks and controls corporate affairs, *even for the protection of those who deal with them*.") (emphasis added).

This view of visitorial power over civil corporations cannot be squared with Petitioner's narrow interpretation of visitorial power. If visitorial power over corporations were limited to "supervision of the internal affairs of corporations," CFHC Br. 6, it would fall far short of the state's control over individuals.

Petitioner's amici acknowledge "[t]he similarity between the Attorney General's method and common methods of exercising visitorial powers" but contend that "other non-visitorial powers," such as the police power, "were also exercised through inspection of records and suits to enjoin practices." CFHC Br. 19-20. The short answer to this argument is that the Attorney General's method is very similar to "common methods of exercising visitorial powers" because it *is* an exercise of visitorial power. Petitioner and his amici cannot avoid this result by contending that they are exercising "police power" rather than visitorial power. Banks historically have been so heavily regulated that the visitorial power and the police power often merged, in the banking context, such that the power to exercise superintendence over a bank was viewed as including the power to set substantive rules for the bank's conduct. *See* Thompson, *supra* at 556 ("The police power, *in its visitorial aspect*, as exercised by

congress and the several states, *extends to the minutest details of the banking business.*") (emphasis added). Thus, Petitioner derives no benefit from seeking to distinguish visitorial power from police power in the context of Section 484.

In this case, it is undisputed that Petitioner seeks to exercise examination and enforcement authority over national banks. Petitioner is seeking to examine national banks' books and records through administrative subpoenas and requests for information. Accordingly, the acknowledged "similarity between the Attorney General's method and common methods of exercising visitorial powers," CFHC Br. 19, is dispositive in this case. The OCC's exclusive visitorial powers under Section 484(a) are controlling here.

D. Preemption Under The National Bank Act Does Not Turn On Whether A State Banking Regulation "Externalizes Costs."

Petitioner's amicus argues that Petitioner's actions are not preempted by federal law because they "generate costs and benefits only within the state and do[] not threaten to create external costs." CFHC Br. 29. The "externalities" inquiry proposed by Petitioner's amicus is irrelevant under this Court's decisions determining the scope of preemption under the National Bank Act. It is also erroneous on its own terms.

An inquiry into "external costs" is irrelevant for preemption purposes. As the Court held in *Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S.

373 (1954), when "[t]here appears to be a clear conflict between the law of New York and the law of the Federal Government[, w]e cannot resolve conflicts of authority by our judgment as to the wisdom or need of either conflicting policy. The compact between the states creating the Federal Government resolves them as a matter of supremacy. However wise or needful New York's policy, . . . it must give way to contrary federal policy." *Id.* at 378-79. Applying these principles, the Court held in *Franklin National Bank* (and in other cases), that the state law at issue was preempted without inquiring into whether it imposed costs in other states.

Moreover, the "externalities" argument fails on its own terms because it ignores the economic reality that Petitioner's actions impose costs on the national bank generally and thus affect the national bank's operations in all states. As a matter of policy, Congress and the OCC have chosen coordinated and uniform enforcement of applicable state law by a federal regulator to reduce the risk that politically motivated state prosecutorial authorities will seek to reap local windfalls from national banks, thereby externalizing the costs of such enforcement actions to the national bank's out-of-state customers and shareholders. That policy choice is reflected in the text and structure of multiple provisions of federal banking law, including Section 484.

CONCLUSION

For the foregoing reasons, as well as for those reasons set forth in Respondents' briefs, the judgment should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ANDREW W. CUOMO, in his Official Capacity as Attorney General for the State of New York,

Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., and OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL FAIR HOUSING ALLIANCE, AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are civil rights groups committed to the effective enforcement of antidiscrimination and consumer protection laws. More details about the individual *amici* are included in the Appendix.

SUMMARY OF ARGUMENT

This case demonstrates perfectly why it is inconceivable to think that Congress intended for any federal agency – much less the Office of the Comptroller of the Currency ("OCC"), with its extremely limited resources and oversight capacity – to preclude states from vigorously enforcing their own fair lending and antidiscrimination laws. In 2005, the New York Attorney General learned, based on data publicly available pursuant to the federal Home Mortgage Disclosure Act (HMDA), that several national banks had issued a disproportionate number of high-interest home mortgage loans to minority borrowers. Pet. 10; Pet. App. 68a (citing, *e.g.*, N.Y. EXEC. LAW § 296-a). Concluding that the data established a *prima facie* case of race discrimination, the Attorney General sent letters to several banks requesting additional information. Pet. App. 68a.

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent The Clearing House Association, L.L.C. have filed global consent letters with the Clerk of the Court; a letter of consent from respondent Office of the Comptroller of the Currency has been lodged with the Clerk of the Court pursuant to Rule 37.3.

Although it had access to the same HMDA data on which the New York Attorney General relied, OCC was not actively investigating the banks in question. Nor did it commence a complementary investigation of its own upon learning of the Attorney General's letters. Instead, OCC sued to enjoin New York's investigative and enforcement efforts, even before the national banks could do so.

OCC's action cuts at the heart of the overlapping regulatory scheme envisioned by Congress. That scheme allows states to serve as enforcers of fair lending laws alongside the federal government and provide a concerted two-part force to address the lending discrimination, disinvestment, and decay that have long impacted minority communities. By asserting exclusive authority to enforce state fair lending laws, OCC has improperly assumed exclusive power for itself in a vital realm of civil rights enforcement, where it is simply inconceivable that Congress intended federal agencies to displace states from taking robust action to ensure compliance with their own laws. Indeed, one recent addition to that scheme – the Riegle-Neal Interstate Banking and Efficiency Act – expressly preserves an important role for the states in enforcing fair lending laws.

The federal fair housing statutory scheme enacted by Congress thus recognizes that vigorous state enforcement can and should play an important role to address the nation's history of lending discrimination, which persists into the present and has contributed significantly to the current foreclosure crisis. Although the private sector maintained discriminatory lending policies long before the federal government became involved in the

lending industry, the government nonetheless bears substantial responsibility for this pattern. Beginning with the Great Depression, the government implemented the same kinds of overt discriminatory practices already in use in the private sector, but on an unprecedented scale. Although Congress eventually enacted legislation intended to eliminate lending discrimination, enforcement of those laws has been, at best, inconsistent.

More recent discriminatory practices have taken new forms. While minorities have historically been denied access to credit, national banks and other lenders have recently targeted minority borrowers for high-cost, predatory subprime loans that commonly are provided in discriminatory ways. The result is a system that disproportionately relegates minorities and minority neighborhoods to high-risk loans while offering similarly situated white borrowers prime interest rates and more favorable terms. This two-tiered system has substantially disadvantaged minority communities, where borrowers pay millions of dollars each year in interest and fees to high-cost lenders and often cannot afford the exorbitant rates that kick in after lower introductory "teaser" rates expire. Awash in such subprime mortgage loans, it is not surprising that these neighborhoods have been hit hardest by the current foreclosure crisis. As foreclosures erode property values and discourage investment, the net effect has been a grievous loss of wealth in minority communities.

The entrenched nature of discrimination in access to credit, with its pernicious intergenerational wealth effects, and the history of inconsistent federal enforcement of fair lending laws thus reinforce the

need for a dual enforcement scheme that operates as Congress intended, by allowing states to serve alongside the federal government in enforcing fair lending laws. OCC simply is not equipped to supplant the states' enforcement of their fair lending laws. Conversely, states better understand their own laws and have far greater resources to address the problem.

ARGUMENT

I. Congress Intended To Preserve An Important Role For The States In Fair Lending Enforcement.

A. The Federal Fair Lending Statutory Scheme Envisions Dual Enforcement of Fair Lending Laws.

Provisions in the federal laws prohibiting discrimination in mortgage lending demonstrate that Congress intended to preserve an important role for the states in fair lending enforcement. When Congress passed Title VIII of the 1968 Civil Rights Act, known as the 1968 Fair Housing Act ("Title VIII") – the first ever federal housing antidiscrimination law[2] – many states and localities already had some form of fair housing law. *See* William J. Collins, *The Political Economy of State Fair Housing Laws Before 1968*, 30 SOC. SCI. HIST. 15 (2006). Recognizing this, Title VIII established state and local agencies as the first line of defense against

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[2] Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3631).

discriminatory housing and lending practices by directing the Secretary of Housing and Urban Development ("HUD") to refer any complaint of a "discriminatory housing practice" to a state or local agency whose law was certified by HUD as substantially equivalent to Title VIII. 42 U.S.C. § 3610(a)-(c) (1982 & Supp. 1987).[3] The 1988 amendments to Title VIII[4] continued and strengthened this enforcement structure. *See* 42 U.S.C. § 3610(f)(1). By then, thirty-six states and seventy-nine localities had laws that HUD recognized as "substantially equivalent." ROBERT G. SCHWEMM, HOUSING DISCRIMINATION § 24.5(3) (1st. ed. 1990). Congress took note, specifically "recogniz[ing] the valuable role state and local agencies play in the [Title VIII] enforcement process." H.R. REP. NO. 100-711, at 35 (1988).

Today, thirty-eight states and sixty-nine local governments have laws that HUD has recognized as "substantially equivalent" to Title VIII, as amended. HUD, Fair Housing Assistance Program Agencies, http://www.hud.gov/offices/fheo/partners/FHAP/agencies.cfm (last visited Mar. 3, 2009). As the district court recognized, the Fair Housing Act authorizes enforcement of these "substantially equivalent" laws by HUD-certified state and local agencies. *See* Pet.

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[3] The certification process is described at 42 U.S.C. § 3610(f)(3)-(5); *see also* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION § 24.5(2) (1st ed. 1990).

[4] Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619.

App. 138a; *see also* 42 U.S.C. § 3610(f).[5] HUD subsequently confirmed that the district court opinions in this case do not "in any way affect[] the authority of state and local agencies to enforce their own fair housing laws that HUD has certified as substantially equivalent to" Title VIII. Authority of Agencies in the Fair Housing Assistance Program to Investigate Allegations of Discrimination in Lending Complaints, 71 Fed. Reg. 33,138 (June 7, 2006) (to be codified at 24 C.F.R. pt. 115). The Second Circuit's decision in no way undermined this interpretation.[6]

Here, New York did not pursue its fair lending investigation pursuant to a "substantially equivalent" law. This fact, however, does not alter the result of the statutory analysis. Other parts of Title VIII (and the FHAA) demonstrate the importance that Congress attributed to broader state enforcement of their fair housing laws – regardless whether those laws have been certified by HUD as "substantially equivalent" to Title VIII. For example, Title VIII and the FHAA direct HUD to cooperate with state agencies that are "formulating or carrying on programs to prevent or eliminate discriminatory housing practices," 42 U.S.C. § 3608(e)(3). Another provision – distinct from the "substantially

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[5] To be certified as substantially equivalent, state fair housing laws must include not only administrative enforcement, but also judicial review and a judicial enforcement alternative similar to the one provided by the FHAA. 42 U.S.C. § 3610(f)(3)(A)(iii)-(iv).

[6] Indeed, OCC recognized this authority in its brief in the Second Circuit. *See* OCC C.A. Br. 56.

equivalent" certification process – explicitly preserves "any law of a State or political subdivision of a State . . . that grants, guarantees, or protects the same rights that are granted by [the Act]." 42 U.S.C. § 3615. Title VIII even provides financial assistance to state and local enforcers. Under 42 U.S.C. § 3616, HUD may "reimburse such agencies and their employees" for their enforcement efforts. Pursuant to that section, HUD developed the Fair Housing Assistance Program, which promotes greater enforcement of fair housing laws by providing financial assistance to state and local agencies. *See* 24 C.F.R. § 115.300.

The second prong of the federal fair lending statutory scheme – the Equal Credit Opportunity Act ("ECOA")[7] – also reflects Congress's intent to preserve a role for the states in fair lending enforcement. In that Act, Congress explicitly refused to "annul, alter, or affect, or exempt any [creditor] from complying with, the laws of any State with respect to credit discrimination," except to the extent that the Act affirmatively preempted those laws. 15 U.S.C. § 1691d(f). Further, although the Board of Governors of the Federal Reserve System is authorized to annul state laws "inconsistent with" ECOA, it may not do so if those laws "give[] greater protection to the applicant." *Id.* And although Congress indicated that the ECOA's provisions "shall be enforced" against national banks by OCC, 15 U.S.C. § 1691c(a)(1)(A), the Senate Report that

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[7] Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. § 1691).

accompanied the bill explained both that "federally chartered financial institutions should be subject to State consumer protection laws" and that the federal government should "not interfere with the efforts of a State to protect consumers" absent "overriding interests to the contrary," S. REP. NO. 93-902, at 12-13 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 6119, 6130-31.

Similarly, other federal housing laws echo the important role of states in fair housing and fair lending enforcement. The 1974 Housing and Community Development Act[8] requires states receiving federal community development grants to "affirmatively further fair housing" and ensure that the grants will be administered in conformity with the Civil Rights Act of 1964 and Title VIII. 42 U.S.C. § 5304(b)(2). This affirmative requirement would be rendered virtually meaningless if states were precluded from investigating violations of their own state fair housing laws against national banks.

In light of this statutory scheme, OCC does not argue that the National Bank Act pre-empts state fair lending laws themselves. Instead, it argues only that the Act precludes states from enforcing their fair lending laws outside the enforcement mechanism of a "substantially equivalent" law. But that position is untenable. OCC has provided no reason to think that Congress intended to pre-empt only state enforcement of state fair lending laws that have not

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[8] Pub. L. No. 93-383, 88 Stat. 633 (codified as amended at 15 U.S.C. § 5301).

been deemed "substantially equivalent," much less that Congress intended to do so without saying explicitly.

In any event, the regulatory scheme envisioned by OCC and the Second Circuit would be particularly odd in light of the Second Circuit's having vacated the portion of the district court injunction prohibiting the New York Attorney General from directly enforcing Title VIII pursuant to *parens patriae* standing. *See* Pet. App. 39a. The Second Circuit thus left open the anomalous possibility that a state such as New York would be unable to enforce its own fair lending and antidiscrimination laws against national banks, but could nonetheless enforce federal fair housing laws against the same entities. Moreover, given the federal statutory scheme's solicitude for state fair lending enforcement, it would be equally odd to read Title VIII's authorization of state enforcement of "substantially equivalent" state fair lending laws as a ceiling that permits states to enforce only state laws similar to Title VIII as amended by the FHAA, rather than as a floor designed to encourage state enforcement of fair lending laws beyond what federal law requires.

B. In Riegle-Neal, Congress Intended For OCC To Complement, Not Preclude, State Fair Lending Enforcement Efforts.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal")[9]

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[9] Pub L. No. 103-328, 108 Stat. 2338.

reinforces the conclusion that states continue to have power to enforce their fair lending laws against national banks. The Act makes clear that state fair lending laws – which, of course, have traditionally been enforced by the states – "*shall* apply" to state branches of national banks "to the same extent as such State laws apply to a branch of a bank chartered by that State." 12 U.S.C. § 36(f)(1)(A) (emphasis added). Although Congress granted OCC concurrent enforcement authority, *see id.* § 36(f)(1)(B), it did not give OCC *exclusive* enforcement authority. Particularly in light of this Court's directive that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States," *see Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)), OCC has provided no basis for concluding that Congress, *sub silentio*, displaced the states' historic enforcement powers. *See Wyeth v. Levine*, slip op. 18 (Mar. 9, 2009) (plurality) ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point" but failed to do so).

Respondents' argument that Congress intended OCC to be the exclusive enforcer of state law rests on a strained reading of 12 U.S.C. § 36(f)(1)(B), which provides that OCC "shall" enforce such laws. *See, e.g.*, BIO 31. This argument is contrary to both the text of the statute and basic principles of statutory interpretation. With regard to the text, "shall" means only that one "has a duty to" or "is required to" carry out certain actions – not that one has the *exclusive* duty or requirement to carry out such actions. *See*

BLACK'S LAW DICTIONARY 1407 (8th ed. 2004); *see also* RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1207 (2000) (defining "shall" as "will have to" or "is . . . obliged to").

OCC's construction of the word "shall" also compels an absurd result, because words appearing in multiple locations in a statute should be similarly construed. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46-5, at 189-90 (7th ed. 2007). If "shall" connotes exclusivity in § 36(f)(1)(B), then it must do the same in § 36(f)(1)(A), in which Congress provided that state community reinvestment, consumer protection, fair lending, and bank branching laws "shall apply" to national bank branches. Because Congress obviously did not intend to subject state branches of national banks only to these enumerated state laws and immunize them from federal banking laws, the more natural reading of the "shall enforce" clause is the reading supported by the dictionary definition of "shall" – *i.e.*, as establishing concurrent, rather than exclusive, federal enforcement authority.

This construction also finds support in the legislative history of Riegle-Neal. Recognizing states' "legitimate interest in protecting the rights of their consumers, businesses, and communities," Congress made clear that it did not intend Riegle-Neal to "weaken States' *authority to protect* the interest of their consumers, businesses, or communities." H.R. REP. NO. 103-651, at 53 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 2068, 2074 (emphasis added). Instead, Congress intended to "preserve[] the States['] *ability to apply* State laws regarding intrastate branching, fair lending and consumer

protection." 140 CONG. REC. H6777 (daily ed. Aug. 4, 1994) (remarks of Rep. Roukema) (emphasis added).

Accordingly, Congress clearly realized that states – through enforcement of their own fair lending laws – play a critical role in safeguarding against discrimination in lending, housing, and access to credit.

II. The Long History Of Racial Discrimination Demonstrates The Need For A Dual Federal And State Fair Lending Enforcement Structure.

The history of lending discrimination is long, well-documented, and – unfortunately – continues in both the private and public sectors. While federal antidiscrimination laws were passed to address this history, they only partially remedied such inequities. Their effects were curtailed by federal regulators' reluctance to enforce these laws against private banks. The legacy of this pervasive discrimination and reluctant, uneven remediation requires all resources – federal *and state* – that can be mustered to address it.

A. The Public And Private Sectors Each Mutually Reinforced The Other's Discriminatory Lending Practices In Ways That Have Had Intergenerational Effects.

During the early years of the twentieth century, private lenders and realtors actively discriminated against minorities to keep neighborhoods racially segregated. KENNETH T. JACKSON, CRABGRASS FRONTIER 198 (1985). Indeed, racial discrimination

was so widespread that a real-estate appraisal manual, regarded as the "bible of appraising," openly advised appraisers "to determine whether there were 'undesirable racial elements' in an area." Calvin Bradford, *Financing Home Ownership: The Federal Role in Neighborhood Decline*, 14 URB. AFF. REV. 313, 323 (1979).[10]

The Great Depression created widespread demand for government action in the housing and lending sectors. JACKSON, *supra*, at 193. In response, Congress passed, among other acts, the Home Owners Loan Act of 1933,[11] which created the Home Owners Loan Corporation ("HOLC") to provide mortgage assistance.[12] The HOLC "institutionalized the practice of 'redlining,'" DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID 51 (1993), a process by which lending institutions – either literally or figuratively – "block[ed] off certain areas

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[10] Such practices were part and parcel of widespread and overt discriminatory housing practices during the first decades of the twentieth century. These included local ordinances prohibiting African-Americans from living on blocks where the majority of houses were occupied by white persons, *see Buchanan v. Warley*, 245 U.S. 60 (1917); racially restrictive covenants that continued even after the Supreme Court held them unenforceable in *Shelley v. Kraemer*, 334 U.S. 1 (1948), *see* DUANE LOCKARD, TOWARD EQUAL OPPORTUNITY 120-21 (1968); and the posting of signs by small towns warning African Americans to leave before sunset or not enter at all, *see* JAMES LOEWEN, SUNDOWN TOWNS 4-5 (2005).

[11] Pub. L. No. 73-43, 48 Stat. 128 (1933) (codified as amended at 12 U.S.C. §§ 1461-1468).

[12] § 4, 48 Stat. at 129-32 (repealed by Act of June 30, 1953, ch. 170, § 21, 67 Stat. 126).

of cities within 'red lines,'" refusing "to loan . . . within them," NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, at 101 (1968). Although private lenders already used similar tactics, the HOLC implemented them on an "unprecedented scale," JACKSON, *supra*, at 199, thereby "len[ding] the power, prestige, and support of the federal government to the systematic practice of racial discrimination in housing," MASSEY & DENTON, *supra*, at 52.

HOLC's redlining practices were expanded by the Federal Housing Administration ("FHA"),[13] another New Deal institution created to stimulate the housing market, JACKSON, *supra*, at 203-04. The significance of the FHA's role in redlining during the mid-twentieth century cannot be overemphasized: "No agency of the United States government has had a more pervasive and powerful impact on the American people . . . than the [FHA]." *Id.* at 203.

The FHA played two important roles. First, unlike the HOLC, which directly issued loans and refinanced mortgages, the FHA induced private lenders to issue mortgages by providing an essential ingredient: mortgage insurance. JACKSON, *supra*, at 196, 204. The FHA "engaged in 'both official and informal [f]ederal encouragement of racial segregation' by . . . refusing to provide insurance in integrated neighborhoods, promoting the use of racially restrictive covenants, and red[]lining

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[13] *See* National Housing Act of 1934, Pub. L. No. 73-479, 48 Stat. 1246 (codified as amended at 12 U.S.C. §§ 1701-1750).

practices." *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 466 (D. Md. 2005) (quoting *Equal Educational Opportunity, Part 5 — De Facto Segregation and Housing Discrimination: Hearings Before the S. Select Comm. on Equal Educational Opportunity*, 91st Cong. 2755 (1970) (statement of George Romney, Secretary, HUD)); *see also* DAN IMMERGLUCK, CREDIT TO THE COMMUNITY 94 (2004). In some cases, the presence of even a single non-white family was enough for the FHA to refuse to insure any loans to an entire block. JACKSON, *supra*, at 208-09.

Just as importantly, the FHA acted "as a standard setting agency," establishing and disseminating appraisal, insurance, and loan practices for use by the private sector. IMMERGLUCK, *supra*, at 94. The FHA's embrace of redlining became the standard for private loans: where the FHA refused to insure, private banks refused to lend. Thus, by the 1960s, one-half of Detroit and one-third of Chicago were simply redlined out of eligibility for FHA mortgage insurance. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1311 (1995).[14]

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[14] Other cities faced similar discrimination and segregation problems, leading one court to find that "racial segregation and racial discrimination in public and private housing" created "a housing emergency in Boston." *NAACP v. Harris*, 567 F. Supp. 637, 640-41 (D. Mass. 1983); *see also NAACP v. Sec'y of HUD*, 817 F.2d 149 (1st Cir. 1987) (Breyer, then-Judge) (affirming findings of fact in *Harris*).

This blatant lending discrimination had significant effects on minority borrowers, in the housing sector and beyond. Redlining created a two-tiered lending system that would set the stage for today's subprime crisis: although white borrowers could obtain traditional loans, minority borrowers were forced to resort to less attractive credit instruments, often referred to as the "underworld" of finance. Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 801 & n.69 (1995).

This two-tiered system was also reflected in the small business loan industry, where minorities experienced significant difficulty in obtaining both public and private loans: in the 1940s, only 3.3% of African-American-owned businesses could secure any credit from banks. IMMERGLUCK, *supra*, at 60. In response, minorities set up their own banks. *Id.* at 59. However, racial discrimination limited the banks' ability to obtain and loan capital, thereby "stunt[ing] their ability to serve larger, creditworthy firms" and reducing the ability of minority-owned businesses to expand. *Id.* This pattern of racial discrimination in small business loans continued through the next half-century. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169-70 (10th Cir. 2000) (describing the "striking" evidence of "race-based denial of access to capital" to minority enterprises over time, based on numerous Congressional hearings and reports), *cert. dismissed sub nom. Adarand Constructors v. Mineta*, 534 U.S. 103 (2001) (per curiam).

B. Federal Remedial Legislation Has Failed To Solve Racial Lending Disparities.

Decades of racial discrimination created a "spiral of decline" in inner cities, as a lack of capital depressed property values and drove off businesses. MASSEY & DENTON, *supra*, at 55. This spiral culminated in the race riots of the 1960s, with hundreds of lives lost and millions of dollars in property damage sustained. *Id.* at 58-59. The commission convened to investigate the cause of the riots concluded that redlining was one of the causes of the racial tension and recommended that Congress enact federal fair housing laws. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 257-63 (1968) ("THE KERNER REPORT").

Adopting this recommendation, Congress enacted Title VIII, which – among other things – prohibits racial discrimination in the sale, purchase, brokerage, or appraisal of property. 42 U.S.C. §§ 3604, 3605. In the decade that followed, Congress passed a variety of fair lending laws to complement Title VIII, including the ECOA, the HMDA,[15] and the Community Reinvestment Act ("CRA").[16]

Despite Congress's good intentions, these fair housing and lending laws have failed to remedy the decades-old effects of lending discrimination, in no

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[15] Pub. L. No. 94-200, tit. III, 89 Stat. 1125 (1975) (codified as amended at 12 U.S.C. §§ 2801-2810).

[16] Pub. L. No. 95-128, tit. VIII, 91 Stat. 1111, 1147-48 (1977) (codified as amended at 12 U.S.C. §§ 2901-2905).

small part due to their inconsistent enforcement. *See* NAT'L COMM'N ON FAIR HOUSING AND EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING 10, 13-19, 22-25 (2008) [hereinafter FAIR HOUSING].

First, although Title VIII authorizes individuals who believe that they have been victims of discrimination to file complaints, 42 U.S.C. § 3610(a)(1)(A)(i), limited access to information increases the obstacles to private enforcement in the lending sector. "Individual loan applicants typically are not sophisticated enough to realize when they have been prescreened illegally or denied a mortgage loan on a prohibited basis." Stephen M. Dane, *Eliminating the Labyrinth: A Proposal to Simplify Federal Mortgage Lending Discrimination Laws*, 26 U. MICH. J.L. REF. 527, 544 (1993) (footnote omitted). "The history of discrimination and redlining [that] has made many minorities 'accustomed' to rejection and less likely to question or contest it" has only exacerbated these information asymmetries. IMMERGLUCK, *supra*, at 136.[17]

As a result of the obstacles to individual suits, primary responsibility for enforcement of the federal

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[17] In one recent study, over 80% of those who believed they had experienced discrimination in the housing market did nothing about it. MARTIN D. ABRAVANEL & MARY K. CUNNINGHAM, HOW MUCH DO WE KNOW? PUBLIC AWARENESS OF THE NATION'S FAIR HOUSING LAWS 27 tbl. 12 (2002). Similar information asymmetries hamper individual enforcement of the rights protected by ECOA. *See* Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 626-27 (2005).

fair lending and fair housing laws has fallen to HUD and the Department of Justice ("DOJ"), whose enforcement of Title VIII and the ECOA has been, at best, inconsistent. Under the original version of Title VIII, "HUD ha[d] no power of enforcement." *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 210 (1972). It was instead limited to "informal methods of conference, conciliation and persuasion." 42 U.S.C. § 3610(a) (1982 & Supp. 1987).[18] Even after the 1988 FHAA created an enforcement mechanism for HUD, fair lending enforcement has been limited: HUD filed only 31 discrimination charges in 2007. FAIR HOUSING, *supra*, at 13-14.

A similar story can be told about the DOJ. Under the amended Title VIII and the ECOA, the DOJ's independent enforcement authority is limited primarily to instances of a "pattern or practice" of discrimination or discrimination of "general public importance." 42 U.S.C. § 3614. There was very little fair lending enforcement by the DOJ until 1992. While there was a spurt of fair lending enforcement until 2000, it subsequently dissipated.[19]

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[18] As described above, however, Title VIII – both as originally enacted and in its modern incarnation – carves out a significant role for the states. *See* 42 U.S.C. §§ 3610(f), 3615; Pub. L. No. 90-284, §§ 810(c)-(d), 82 Stat. 81, 86 (1968).

[19] According to the list of cases on the DOJ website, *see* U.S. Dep't of Justice, Fair Housing Cases, http://www.usdoj.gov/crt/housing/fairhousing/caseslist.htm#I (last visited Mar. 4, 2009), fifteen fair lending cases challenging discrimination in real-estate-related lending were brought from 1992-2000, many of which challenged discriminatory predatory

OCC's fair lending enforcement record pursuant to the ECOA, 15 U.S.C. § 1691c(a)(1)(A), is even spottier. During the fifteen-year period from 1990 to 2004, OCC brought only four formal enforcement actions under the ECOA and/or its implementing regulation.[20] And although OCC is required by the ECOA to "refer . . . matter[s] to the Attorney General with a recommendation that an appropriate civil action be instituted" whenever it "has reason to believe that 1 or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of" the ECOA, 15 U.S.C. § 1691e(g), between 1999 and 2005 OCC made only six fair lending referrals to DOJ, only one of which involved discrimination on the basis of race or national origin.[21]

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activities. But since 2001, DOJ has brought only five fair lending cases dealing with residential lending. None has concerned predatory lending practices despite extensive research demonstrating the discriminatory patterns so prevalent in the subprime market. *See* FAIR HOUSING, *supra*, at 23.

[20] This information is contained in annual reports that the Federal Reserve Board ("FRB") and U.S. Attorney General provide to Congress. *See* 15 U.S.C. §§ 1613, 1691f; *see also* FRB, ANNUAL REPORT 2004, at 69-70. The relevant pages from the FRB Annual Reports by year are as follows: for 2003, 67-68; 2002, 75-76; 2001, 134-35; 2000, 105-06; 1999, 107-08; 1998, 221-22; 1997, 192-93; 1996, 200; 1995, 212; 1994, 224-25; 1993, 210-11; 1992, 196-97; 1991, 181-82; 1990, 168. *See* FRB, Reports to Congress, http://www.federalreserve.gov/boarddocs/rptcongress/ (last visited March 4, 2009).

[21] *See, e.g.*, THE ATTORNEY GENERAL'S 2005 ANNUAL REPORT TO CONGRESS PURSUANT TO THE EQUAL CREDIT

Furthermore, although Title VIII requires federal banking regulators, including OCC, to "administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes" of the Act, 42 U.S.C. § 3608(d), there too implementation and enforcement efforts have been inconsistent and sometimes reluctant. This reluctance dates back to the post-Depression era, when banking regulators adopted a policy of "benign neglect" towards discrimination by private lenders. Bradford, *supra*, at 324. Once Title VIII was enacted, federal bank regulators were slow to implement it: it was eight years before any regulator issued a final regulation under the Act, IMMERGLUCK, *supra*, at 137, and it took a lawsuit to force regulators – including OCC – to promulgate regulations to enforce and monitor compliance with federal anti-discrimination laws, including Title VIII. JOHN GOERING & RON WIENK, MORTGAGE LENDING, RACIAL DISCRIMINATION, AND FEDERAL POLICY 402 (1996). Indeed, it was this lawsuit that prompted OCC to create its Consumer Affairs Division. *Id.*

Enforcement of the other federal fair lending laws has been similarly inconsistent. For example, the CRA requires federal banking regulators, including OCC, 12 U.S.C. § 2902(1)(A), to "assess a [regulated] institution's record of meeting the credit

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OPPORTUNITY ACT AMENDMENTS OF 1976, at 1-4. The remaining reports are at http://www.usdoj.gov/crt/housing/housing_special.php.

needs of its entire community, including low- and moderate-income neighborhoods," 12 U.S.C. § 2903(a)(1). However, these assessments of housing and small business loans have been conducted in such a manner that, "[t]hroughout the 1980s, [they] were almost impossible to fail": one study found that only 2.4% of 26,000 CRA examinations conducted between 1985 and 1988 resulted in a poor evaluation. Keith N. Hylton & Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 243 n.33 (1996) (citation omitted). In 1997, OCC made the CRA assessments even less burdensome, counseling its bank examiners to look beyond the banks' self-evaluations of their lending patterns "only where questions are raised." OCC, COMMUNITY REINVESTMENT ACT EXAMINATION PROCEDURES 5 (1997).

III. Lending Discrimination Persists And Plays An Important Role In The Ongoing Foreclosure Crisis And The Elimination Of Wealth Accumulated By Minorities.

Although well-intentioned, federal remedial legislation has failed to eliminate racial discrimination in the credit market. Today, lenders continue to discriminate against minorities, denying them access to credit through redlining and other techniques. Exacerbating racial inequities, the more recent introduction of subprime lending has led to exploitation of the credit vacuum in the form of targeting minorities for high-cost loans that they cannot afford. *See* William C. Apgar & Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending* 1 (Joint Ctr.

for Hous. Studies, Harvard Univ., Working Paper No. W05-11, 2004). The infusion of risky credit in minority communities has recreated a two-tiered system: white borrowers have access to prime-rate loans from mainstream lenders, while minorities are relegated to the subprime market. *See id.* at 1, 10. And although targeted subprime lending is a distinct practice from redlining, its effects are much the same: it undermines minority communities, stripping borrowers of equity and siphoning capital out of neighborhoods struggling to build wealth. *See* GREGORY D. SQUIRES & CHARLES E. KUBRIN, PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY 56 (2006). In the home lending industry, borrowers unable to repay costly mortgages lose their homes, leaving minority communities to again suffer the consequences of rapid disinvestment.

A. Lenders Continue To Deny Minorities Access To Credit Through Redlining And Disparate Treatment Of Minority Applicants.

Notwithstanding remedial legislation, redlining remains a persistent problem today. The handful of cases brought by the DOJ in recent years demonstrates the extent to which the practice continues. For example, as recently as 2006, the DOJ filed a complaint alleging that Centier Bank refused to lend to would-be borrowers in minority neighborhoods. Compl. ¶ 10, *United States v. Centier Bank*, No. 2:06-CV-344 (N.D. Ind. Oct. 13, 2006) (settled by consent order). Two years earlier, the DOJ filed a similar suit against First American Bank, which had "acted to meet the residential, consumer

and business credit needs of predominantly white [areas but] avoided serving the lending and credit needs of minority [areas]." *See* Compl. ¶ 12, *United States v. First Am. Bank*, No. 1:04-CV-4585 (N.D. Ill. July 13, 2004) (settled by consent order). That same year, DOJ settled a case against Old Kent Bank, which allegedly issued only 2.2% of all its loans in the Detroit metropolitan area to applicants in Detroit's inner city. *See United States v. Old Kent Fin. Corp.*, No. 04-71879, 2004 WL 1157779, at *3 (E.D. Mich. May 19, 2004) (entering settlement agreement). Borrowers have filed similar suits, including one accusing Bank of America of "schem[ing] to direct its . . . mortgage transactions . . . in neighborhoods primarily comprised of Caucasians," *Johnson v. Equicredit Corp.*, No. 1C5197, 2002 WL 448991, at *4 (N.D. Ill. Mar. 22, 2002) (settled out of court).

A key component of redlining is the banks' refusal to establish branches in minority neighborhoods. *See* David N. Figlio, *Bank Consolidations and Minority Neighborhoods*, 45 J. URB. ECON. 474 (1999). In a particularly striking example, as of 2000, one lender had established fifty-three branches in the greater Detroit area without locating a single one in the largely African-American inner city. *Old Kent Fin. Corp.*, 2004 WL 1157779, at *2. Similarly, of Centier Bank's twenty-seven branches around Gary, Indiana, none were located in minority neighborhoods as of 2001. *See* Compl. ¶ 13, *Centier Bank*, No. 2:06-CV-344. The dearth of bank branches in minority communities significantly undercuts access to credit, because individuals in those communities are denied services like credit counseling and bank-funded credit lines. Gregory D. Squires, *The New Redlining*, *in* WHY THE POOR PAY

MORE 1, 8 (Gregory D. Squires ed. 2004). The problem is particularly acute for small businesses, which require in-person visits from loan officers to secure credit. *See* IMMERGLUCK, *supra*, at 76. Because loan officers often make loans only within a small radius of their branch and may also be reluctant to enter minority neighborhoods, minority-owned firms lack opportunities available to businesses in white areas rich in banking services. *Id.* at 67, 76.

When minority borrowers do seek loans from mainstream lenders, the lenders frequently subject them to discriminatory treatment. One government study that compared 250 test pairs, each including one white and one African-American or Latino borrower, concluded that despite having equal or better qualifications, minorities were repeatedly offered lower loan amounts, fewer loan products, and less credit counseling than white borrowers. HUD, ALL OTHER THINGS BEING EQUAL: A PAIRED TESTING STUDY OF MORTGAGE LENDING INSTITUTIONS 39 (2002). Similar studies revealed that lenders treated minorities unequally in nearly half of their interactions. *See Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations of the H. Financial Serv. Comm.*, 110th Cong. 268 (2007) (statement of John Taylor, President and CEO, National Community Reinvestment Coalition). Given these patterns, it is not surprising that lenders deny minorities loans at significantly higher rates than white applicants. CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, ACCESS DENIED: LOW INCOME AND MINORITY FAMILIES FACE MORE CREDIT CONSTRAINTS AND HIGHER BORROWING COSTS 2 (2007).

B. The Present Credit Crisis Reflects A New Discriminatory Pattern Of Targeting Minorities For High-Cost, Subprime Loans.

Decades of discrimination have left many minorities without adequate credit and unfamiliar with the lending process. John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 637 (2008). Taking advantage of these conditions, unscrupulous lenders peddling high-cost loans have increasingly focused on minority communities. *See* SQUIRES & KUBRIN, *supra*, at 56. This practice has been dubbed "reverse redlining" for both the deliberateness with which minorities are targeted and lenders' efforts to take advantage of inexperienced borrowers by flooding them with costly loans rather than denying them credit. *See id.*; Compl. 20, *Mayor of Baltimore v. Wells Fargo Bank*, No. 1:08-CV-00062 (D. Md. Jan. 8, 2008) (alleging that the bank "[t]arget[ed] Baltimore's African American [n]eighborhoods for [i]mproper and [i]rresponsible [l]ending [p]ractices").

The explosion of "fringe" lenders in minority neighborhoods is a prime example of reverse redlining. Check cashers, payday lenders, and tax refund advance services flourish in communities where banks refuse to lend. *See* Squires, *supra*, at 7; NEIGHBORHOOD ECON. DEV. ADVOCACY PROJECT, RAPID RIP-OFFS: TAX REFUND ANTICIPATION LENDING IN NEW YORK CITY 2 (2006) [hereinafter RAPID RIP-OFFS]. Recent studies found that African-American neighborhoods have an average of three times more payday lenders than white neighborhoods, CTR. FOR

RESPONSIBLE LENDING, RACE MATTERS: THE CONCENTRATION OF PAYDAY LENDERS IN AFRICAN AMERICAN NEIGHBORHOODS IN NORTH CAROLINA 2 (2005) [hereinafter PAYDAY LENDERS], and refund advance services cluster in areas where minorities comprise over ninety-five percent of the population, RAPID RIP-OFFS, *supra*, at 4. Although these lenders purport to relieve financial woes by providing access to quick cash, they in fact trap borrowers in debt, as few can repay loans and cover the exorbitant fees in the short time allotted. PAYDAY LENDERS, *supra*, at 3-4. Use of fringe lending services can be extremely costly: borrowers pay, on average, $1000 more annually in fees to check cashers and payday lenders than they would to banks. SQUIRES & KUBRIN, *supra*, at 15.

Lenders also target minorities for subprime credit cards. *See e.g.*, Compl. ¶ 11, *United States v. Fid. Fed. Bank*, No. 1:02-cv-03906-NG-MDG (E.D.N.Y. July 8, 2002) (alleging that the lender marketed high-interest credit cards to African Americans and Latinos through church groups and in-home sales) (settled out of court). Aggressive marketing strategies and abusive terms have led to rising debts among minorities. JAVIER SILVA & REBECCA EPSTEIN, COSTLY CREDIT: AFRICAN AMERICANS AND LATINOS IN DEBT 6-7 (2005).

C. As A Result Of Reverse Redlining In The Home Lending Industry, Minorities Account For A Disproportionate Share Of Subprime Mortgages.

Particularly pervasive in the home mortgage industry is reverse redlining, which targets minority

borrowers for high-cost, subprime loans. In perhaps the most pernicious practice, profit-seeking mortgage lenders often attempt to steer minority borrowers towards risky subprime loans even when they would qualify for prime loans. FAIR HOUSING, *supra*, at 33. Indeed, one study of subprime loans made between 2000 and 2006 calculated that over half of subprime borrowers – among whom minorities are over-represented relative to their share of the population – could have qualified for prime-rate mortgages. *Id.* The differences in the overall costs to the borrower can be substantial. On average, a subprime loan can cost the borrower nearly $300 more per month, and as much as $100,000 over the life of the loan, *see* NAT'L CMTY. REINVESTMENT COAL., INCOME IS NO SHIELD AGAINST RACIAL DIFFERENCES IN LENDING II, at 8 (2008) – money that could otherwise be used elsewhere, including for education or reinvestment in the community.

Reverse redlining has had predictable effects: although the majority of subprime loans go to non-Latino white borrowers, approximately half of all mortgage loans made to African Americans and Latinos are subprime, compared with less than twenty percent of loans made to white borrowers. FAIR HOUSING, *supra*, at 33 (analyzing 2006 HMDA data). In New York, where the Attorney General's investigation into discriminatory lending sparked this lawsuit, the ten neighborhoods with the highest levels of subprime lending are predominantly African American or Latino, while the ten neighborhoods with the lowest levels are predominantly white. Manny Fernandez, *Study Finds Disparities in Mortgages by Race*, N.Y. TIMES, Oct. 15, 2007, at A20.

Racial disparities persist even when income and credit history are taken into account. IMMERGLUCK, *supra*, at 118. Indeed, the disparities increase as salaries rise, with upper-income minorities receiving twice as many high-cost mortgage loans as upper-income whites. *See* Vikas Bajaj & Ron Nixon, *For Minorities, Signs of Trouble in Foreclosures*, N.Y. TIMES, Feb. 22, 2006, at A1.

National banks bear a significant share of the responsibility for the disproportionate number of subprime loans made to minorities. *See* CAL. REINVESTMENT COAL., WHO REALLY GETS HIGHER-COST HOME LOANS? 18 (2005). One study analyzing California's home loan market found that African Americans bore the heaviest burden: all told, they were over four times more likely than whites to receive high-cost home-refinance loans from national banks. *Id.*

D. Discriminatory Lending In The Mortgage Industry Frustrates Upward Mobility And Eliminates Wealth Accumulated By Minorities.

The effects of reverse redlining in the mortgage industry are both significant and wide-ranging. One unfortunate by-product of targeting minorities for high-cost home loans is that minorities are often unable to move into neighborhoods where they would enjoy better schools and more plentiful employment opportunities. *See* SQUIRES & KUBRIN, *supra*, at 23, 29. The inability to access such areas, which have often been historically white, thwarts minorities' advancement and perpetuates long-standing wealth disparities. *See id.* at 23.

The concentration of subprime mortgages among minorities also strips existing wealth. Because of exorbitant fees, initial higher interest rates, and resets that increase these rates, subprime loans are ten to twenty times more likely to end up in foreclosure than prime loans. *See* Dan Immergluck, *From the Subprime to the Exotic: Excessive Mortgage Market Risk and Foreclosures*, 74 J. AM. PLAN. ASS'N 59, 59-60, 66 (2008). Not surprisingly, minority neighborhoods have already been hardest hit by the foreclosure crisis, which is likely to worsen before it improves, *see* CTR. FOR RESPONSIBLE LENDING, UPDATED PROJECTIONS OF SUBPRIME FORECLOSURES IN THE UNITED STATES AND THEIR IMPACT ON HOME VALUES AND COMMUNITIES 1 (2008) (predicting that 2.2 million subprime mortgages will enter foreclosure by the end of 2009). In Chicago, where foreclosures tripled between 1993 and 2005, minority neighborhoods account for sixty-five percent of foreclosure filings. Bajaj & Nixon, *supra* (noting similar trends in Atlanta and Philadelphia). These areas averaged 41.6 foreclosures per 1000 mortgageable properties in 2007, over double the regional average. WOODSTOCK INST., FORECLOSURES IN THE CHICAGO REGION CONTINUE TO GROW AT AN ALARMING RATE 4 (2008).

The disproportionate impact of the foreclosure crisis has stripped minority communities of the hard-won gains in wealth that resulted from recent increases in legal, educational, and employment opportunities. *See* Melvin Oliver, Univ. of Cal. – Santa Barbara, Testimony at the National Commission on Fair Housing and Equal Opportunity 1 (Sept. 9, 2008). Historically, it is one of the greatest

losses of wealth in minority communities in generations. *Id.* at 5.

Although massive in scale, this pattern of losses is not unfamiliar, but is instead reminiscent of the "spiral of decline" sparked by redlining in the 1960s. When foreclosure rates are high, home values plummet, both because foreclosed homes sell at below-market prices and because the supply of available homes outpaces demand. KAI-YAN LEE, FED. RESERVE BANK OF BOSTON, FORECLOSURE'S PRICE-DEPRESSING SPILLOVER EFFECTS ON LOCAL PROPERTIES 1 (2008). The rising crime rates that accompany foreclosures then exacerbate the decline in home values. *See* Dan Immergluck & Geoff Smith, *The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime*, 21 HOUS. STUD. 851 (2006). The downward spiral continues as the neighborhood's remaining distressed borrowers lack the equity to refinance their own subprime loans because of the drop in home values, driving them into foreclosure. ELLEN SCHLOEMER ET AL., CTR. FOR RESPONSIBLE LENDING, LOSING GROUND: FORECLOSURES IN THE SUBPRIME MARKET AND THEIR COST TO HOMEOWNERS 3-4 (2006).

The effects of the foreclosure crisis extend beyond the individual to municipalities and residents in the broader community. Each foreclosure increases the burden on local public agencies, requiring them to spend more money on police patrols, building inspections, demolition contracts, and legal and administrative procedures. WILLIAM C. APGAR & MARK DUDA, HOMEOWNERSHIP PRES. FOUND., COLLATERAL DAMAGE: THE MUNICIPAL IMPACT OF TODAY'S MORTGAGE FORECLOSURE BOOM 4, 6 (2005). Distressed borrowers are also often unable to pay

property taxes, reducing the revenue flowing to local governments, *id.* at 7, and leading to tax increases and cuts in social services.

IV. In Light Of OCC's Limited Enforcement Capacity, The States Are Especially Well-Suited To Serve As Dual Enforcers Of Their Own Fair Lending Laws.

Congress's desire to preserve an important role for the states in the enforcement of fair lending laws reflects a common-sense approach to a severe and widespread problem. The overlapping state and federal regulatory schemes that Congress envisioned take account of OCC's limited capacity to enforce state fair lending laws as well as the suitability of, and incentives for, state enforcement. Such a dual enforcement regime will likely result in increased enforcement of fair lending laws and thereby better protect minority communities.

A. OCC Is Not Equipped To Act As The Exclusive Enforcer Of State Fair Lending Laws

Not only is OCC's actual record of federal fair lending enforcement spotty, as explained *supra* at 20-22, but OCC's capacity to serve as the exclusive enforcer of state fair lending laws, in addition to federal laws, is quite limited. To successfully police the lending practices of national banks' state branches, OCC would have to respond to complaints from, and conduct independent investigations in, all fifty states. But it lacks the resources, time, and manpower to do so. In 2005, for example, only one percent of OCC's budget went to its Consumer

Assistance Group, the fifty-person division charged with handling *all* consumer complaints. *See Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 80 (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School). Put another way, if OCC were indeed the exclusive enforcer of state fair lending laws, it alone would be responsible for "investigat[ing] all such complaints for 2150 national banks in the 50 States from a single customer assistance center which only takes calls from 9 am to 4 pm, on four days each week, excluding Federal holidays." H. COMM. ON FIN. SERVS., 108TH CONG., VIEWS AND ESTIMATES OF THE COMMITTEE ON FINANCIAL SERVICES ON MATTERS TO BE SET FORTH IN THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2005, at 16 [hereinafter HOUSE VIEWS AND ESTIMATES].

The problems created by OCC's limited enforcement capacity are compounded by the agency's financial incentives to refrain from investigating claims of lending discrimination. OCC's budget depends on assessments against nationally chartered banks, OCC, ANNUAL REPORT, FISCAL YEAR 2005, at 7 (2005), which can abandon their national charters at any time. OCC thus has a vested interest in reducing the regulatory burden on national banks to make the national charter as attractive as possible and thereby preserve its own budget. Indeed, when asked about OCC's power to preclude enforcement of state fair lending laws, former Comptroller John Dugan responded that "[preclusion] is one of the

advantages of a national charter, and I'm not the least bit ashamed to promote it." Paul Beckett & Jess Bravin, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers—Dependent on Lenders' Fees, OCC Takes Their Side Against Local, State Laws—Defending Uniform Rules*, WALL ST. J., Jan. 28, 2002, at A1.

In the five years since OCC appointed itself the exclusive enforcer of state fair lending laws, its limited enforcement capacity and its incentives to refrain from regulating have predictably prevented it from adequately policing the lending practices of national banks. For example, as discussed above, *see supra* at 20, OCC has an extremely poor track record in referring matters to DOJ pursuant to 15 U.S.C. § 1691e(g). OCC's last reported OCC referral based on race discrimination was in 1999, *see* Compl. ¶ 1, *United States v. Deposit Guar. Nat'l Bank*, No. 3:99-CV-00670-STL (S.D. Miss. Sept. 29, 1999).

OCC's failure to make referrals and enforce state laws cannot be attributed to a lack of discriminatory lending practices by national banks. Indeed, studies have confirmed that national banks frequently offer loans to minorities on terms that are less favorable than those offered to white borrowers. *See* CAL. REINVESTMENT COAL., *supra*, at 3, 18. But even if national banks were not already engaging in discriminatory lending, OCC's failure to investigate their lending practices would give them a blank check for future discrimination.

B. States Are Well Suited To Enforce State Fair Lending Laws.

Because states have the necessary resources to investigate and prosecute discriminatory lenders, they are ideally positioned to serve alongside the federal government as co-enforcers of fair lending laws. First, state enforcement agencies are by their nature better equipped to understand and apply their state's own fair lending laws.[22] Second, because they are responsible for a smaller geographic area, state enforcement agencies can conduct more comprehensive investigations. Third, and perhaps most importantly, states have substantial manpower to devote to scrutinizing the lending practices of national banks: collectively, state banking agencies and state attorneys general employ roughly seven hundred full-time examiners and attorneys to monitor

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[22] Indeed, states have enacted a variety of antidiscrimination laws designed in part to prevent discriminatory housing practices – all of which OCC claims the exclusive authority to enforce. *See, e.g.*, ALA. CODE §§ 24-8-1 to -15 (West 2008); CAL. GOV'T CODE §§ 12955-12956.2 (2008); DEL. CODE ANN. tit. 6, §§ 4600-4619 (West 2009); GA. CODE ANN. §§ 8-3-200 to -223; (West 2008); HAW. REV. STAT. §§ 515-1 to -20 (2008); KAN. STAT. ANN. §§ 44-1015 to -1044 (West 2008); LA. REV. STAT. ANN. §§ 50:2601-:2614 (West 2008); N.Y. EXEC. LAW §§ 290-301 (McKinney 2009); N.C. GEN. STAT. ANN. §§ 41A-1 to -10 (West 2008); R.I. GEN. LAWS §§ 34-37-1 to -11 (West 2008); S.C. CODE ANN. §§ 31-21-10 to -150 (West 2008); TEX. PROP. CODE ANN. §§ 301.001-.171 (Vernon 2007); UTAH CODE ANN. §§ 57-21-1 to -14 (West 2008); VA. CODE ANN. §§ 36-96.1 to .23 (West 2008); WIS. STAT. § 106.50 (West 2007).

compliance with consumer protection and fair lending laws. HOUSE VIEWS AND ESTIMATES, *supra*, at 16.

State enforcers have put these resources to good use. In 2001, for example, the North Carolina Attorney General's office obtained a twenty-million-dollar settlement in a predatory lending case against Citigroup. *See* Christopher L. Peterson, *Preemption, Agency Cost Theory, and Predatory Lending by Banking Agents: Are Federal Regulators Biting Off More Than They Can Chew?*, 56 AM. U. L. REV. 515, 522 (2007). In 2003, the state agencies responsible for supervising banks initiated over twenty thousand investigations in response to consumer complaints, leading to over four thousand enforcement actions against abusive mortgage lenders. HOUSE VIEWS AND ESTIMATES, *supra*, at 16. And although OCC thwarted the investigation of national banks at issue in this case, the New York Attorney General has continued to enforce its fair lending laws against other entities. In January 2009, for example, it reached a settlement with two mortgage brokers, who agreed to pay $665,000 in restitution to 455 African-American and Latino customers charged substantially higher fees than similarly qualified white borrowers. *See* Bob Tedeschi, *Safeguarding Against Loan Discrimination*, N.Y. TIMES, Jan. 23, 2009, at RE6.

Nor is there any reason to believe that allowing states to enforce their own fair lending laws would subject national banks to multiple, possibly conflicting, regulatory schemes. First, the decision to retain these schemes has already been made by Congress, *see supra* Part I(B). But in any event, state attorneys general can and frequently do coordinate their efforts. For example, in 2002, a joint

investigation initiated by the attorneys general and financial regulatory agencies of nineteen states and the District of Columbia led to a settlement with Household Finance Corporation totaling nearly a half-billion dollars. U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 62-63 (2004).[23] If anything, allowing states to enforce their own fair lending laws will likely result in more enforcement – and, therefore, more protection for minority communities.

As the number of investigations and enforcement actions by states demonstrates, many states are highly motivated to vindicate their citizens' civil rights. Indeed, state enforcement agencies are especially sensitive to local concerns because they are in contact with their constituents more regularly. *See Printz v. United States*, 521 U.S. 898, 920 (1997) ("The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens." (citing *New York v. United States*, 505 U.S. 144, 168-69 (1992))). States have led the way in implementing fair housing legislation; when Title VIII was enacted in 1968, twenty-two states had

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[23]*See also* U.S. GEN. ACCOUNTING OFFICE, OCC PREEMPTION RULES: OCC SHOULD FURTHER CLARIFY THE APPLICABILITY OF STATE CONSUMER PROTECTION LAWS TO NATIONAL BANKS 20 (2006) (describing cooperative judicial proceedings brought by states against national banks concerning telemarketing practices and the disclosure of cardholder information to third parties).

already passed fair housing legislation. Collins, *supra*, at 16, 20. Today, at least twenty-seven states have adopted laws designed expressly to curb predatory lending. *See* Peterson, *supra*, at 516 n.3 (listing state predatory lending statutes).

This is not to say, of course, that states will always be better enforcers of fair lending and fair housing laws than the federal government. After all, residential segregation was perpetuated by state and local governments as well as by federal agencies. Rather, it stands to reason that the regulatory framework designed by Congress, in which multiple enforcement regimes coexist, will likely result in more enforcement overall, and thus more protection of minority communities.

CONCLUSION

For the foregoing reasons, as well as those outlined by the petitioner, the decision below should be reversed.

Respectfully submitted,

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March 4, 2009

APPENDIX

APPENDIX

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Among its other fields of specialization, the Lawyers' Committee works with communities across the nation to combat, protest, and remediate discriminatory housing and lending practices. The Lawyers' Committee has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Francisco, Jackson, MS and Washington, D.C.

The National Fair Housing Alliance ("NFHA") is a consortium of private, non-profit fair housing organizations, state and local civil rights groups, and individuals. It was founded in 1988 to lead the battle against housing discrimination and to ensure equal housing opportunity for all people. Through leadership, education and outreach, membership services, public policy initiatives, advocacy and enforcement, the NFHA promotes equal housing, lending, and insurance opportunities.

Founded by Charles Hamilton Houston who hired Thurgood Marshall as its first Director-Counsel, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has provided legal assistance to African Americans and other people of color in securing their civil and constitutional rights for over six decades. Through litigation including such seminal cases as *Shelley v. Kraemer*, 334 U.S. 1 (1948), LDF has maintained a longstanding commitment to eradicating discriminatory lending

and other practices that have perpetuated residential segregation and impeded access to economic opportunity. LDF has also been a zealous advocate for laws and policies at the federal and state levels guaranteeing fair lending and equal access to credit for all Americans.

AMICUS CURIAE BRIEF

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ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*[1]

Amici are Members of the House of Representatives who are keenly interested in the effect of federal regulatory preemption on the enforcement of consumer protection and fair lending laws. *Amici* are concerned that executive agencies may displace state law or state law enforcement by regulation, even in the absence of clear authority from Congress. *Amici* have witnessed the effect of a regulatory void created by agency preemption in the absence of a robust federal enforcement scheme. Preemption of state law is an important matter that deeply implicates the relations between the state and federal governments. As explained in this brief, *Amici* submit that agency regulations preempting state law are not entitled to *Chevron* deference unless Congress has clearly delegated such authority.

Representative Barney Frank chairs the House Financial Services Committee. He was elected in 1981 and represents the Fourth Congressional District of Massachusetts.

Representative John Conyers, Jr. chairs the House Judiciary Committee. Elected in 1964, Representative Conyers represents the Fourteenth Congressional District of Michigan.

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[1] The parties have consented to the filing of this brief. No party, counsel for a party, or person other than amici or their counsel authored this brief in whole or in part or made a monetary contribution intended to fund itspreparation or submission.

Representative Carolyn B. Maloney is a member of the House Financial Services Committee, and the former chair of the Subcommittee on Financial Institutions and Consumer Credit, which has jurisdiction over national banks and bank regulators. She is also chair of the Joint Economic Committee. Representative Maloney was elected to Congress in 1992, and represents New York's Fourteenth Congressional District.

Representative Melvin L. Watt is a member of both the House Financial Services Committee and the House Judiciary Committee. He chairs the Financial Services Subcommittee on Domestic Monetary Policy and Technology. Representative Watt is also a member of Judiciary Committee Subcommittees on the Constitution, Civil Rights and Civil Liberties, and the Subcommittee on Commercial and Administrative Law. He was elected to Congress in 1992, and represents North Carolina's Twelfth Congressional District.

Representative Luis V. Guttierez also is a member of both the House Financial Services Committee and the House Judiciary Committee. He is the current chair of the Subcommittee on Financial Institutions and Consumer Credit of the Financial Services Committee. Representative Guttierez was elected to Congress in 1992, and represents the Fourth Congressional District of Illinois.

Representative William Lacy Clay, Jr. is a member of the House Financial Services Committee and the Committee on Oversight and Government Reform. He was elected to Congress in 2000, and services the First Congressional District of Missouri.

Mr. Clay served 17 years in the House and Senate of the Missouri State Legislature and chaired the Missouri Senate Banking Committee.

STATEMENT

The Nation is facing an economic crisis. Over the past two years, *amici* have been asked to consider legislation making sweeping changes in the regulation and structure of the financial services sector. Hearings held in connection with such legislation have shown that the absence of effective regulation played a significant role in creating massive portfolios of risky and now "toxic" assets, including mortgage-backed securities. In particular, testimony presented at these hearings have shown that regulators failed to impose restraints on the types of mortgages that could be sold to consumers, with the result that many homebuyers obtained mortgages that they could not repay (or even could be expected to repay).[2] Financial markets also failed to

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[2] *E.g.*, the following hearing testimony available at the Financial Services Committee site (http://financialservices.house.gov/hearings.html): Subprime and Predatory Mortgage Lending: New Regulatory Guidance, Current Market Conditions and Effects on Regulated Financial Institutions: Hearing Before the H. Comm. on Financial Services, Subcomm. on Financial Institutions and Consumer Credit, 110th Cong. (March 27, 2007), (written testimony of Michael D. Calhoun, Center for Responsible Lending, 11-12); Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. On Financial Services, 110th Cong. (June 13, 2007) (written testimony of Steven L. Antonakes, Massachusetts Commissioner of Banks, 6-7); *id.* (written testimony of Thomas J. Miller, Attorney General of Iowa, 7-11); Improving Federal Consumer Protection in Financial Services – Consumer and Industry Perspectives: Hearing Before the H. Comm. on Financial

restrain such doomed transactions because mortgage originators could pass risky loans on to the secondary market, where investors and rating agencies overlooked bad underwriting on the assumption that housing prices would continue to rise, so that the homes could be refinanced or sold at a profit. H.R. Rep. No. 110-619, at 20 (2008); *id.* at 83-84 (dissenting views). The consequences of lending based on an expected rise in asset values rather than the borrower's ability to repay the loan are now evident to all. Foreclosures are devastating entire neighborhoods in many areas of the country. *Id.* at 21 (citing estimate that more than 40 million homes will lose value because of foreclosures).

Neighborhoods with high minority populations have been hit especially hard by home foreclosures.[3]

Services, 110th Cong. (July 25, 2007), (written testimony of Travis B. Plunkett, Legislative Director, Consumer Federation of America).

The Inspector General of the Treasury Department has recently confirmed that OCC's sister agency, the Office of Thrift Supervision, failed to prevent risky lending practices by Indymac Bank. Safety and Soundness: Material Loss Review of Indymac Bank, FSB, 15-30 (OIG-09-032) (Feb. 26, 2009)

[3] Mortgage Lending Disparities: Hearing Before the H. Comm. on Financial Services (Oct. 15, 2007), (testimony of Mass. Gov. Deval Patrick); Effects of the Subprime Mortgage Crisis in New York City and Efforts to Help Struggling Homeowners: Hearing Before the H. Comm. on Financial Services, Subcomm. on Financial Institutions and Consumer Credit, 110th Cong. (Feb. 11, 2008), (testimony of Sarah Gerecke, Chief Executive Officer, Neighborhood Housing Services of New York City); Legislative Proposals on Reforming Mortgage Practices: Hearing Before the, H. Comm. on Financial Services, 110th Cong. (Oct. 24, 2007),

One of the reasons is the high proportion of risky mortgages that were sold to minority borrowers in recent years. Economists have documented the continued existence of a "dual" mortgage market. William Apgar and Allegra Calder, *The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending*, in The Geography of Opportunity: Race and Housing Choice in Metropolitan America 101 (Xavier de Souza Briggs ed., 2005). Today, racial discrimination in lending takes the form of steering borrowers to higher-priced loans as well as outright refusal to lend. *Id.* at 114-15.[4] Consequently, minority borrowers who could qualify for prime mortgages are more likely than white borrowers to turn (or to be steered) to higher-priced subprime loans. The higher interest payments on subprime loans (after the expiration of "teaser" rates) mean a greater risk of default and foreclosure if the homeowner loses income through illness or unemployment.

(testimony of Hilary Shelton, Director, Washington Bureau of NAACP).

[4] *See also* Mortgage Lending Disparities: Hearing Before the H. Comm on Financial Services, 110th Cong. (Oct. 15, 2007) (written testimony of Jim Campen, Executive Director, Americans for Fairness in Lending, "Persistent Patterns and Industry Changes: Mortgage Lending Disparities in Greater Boston," 4-7); National Community Reinvestment Coalition, Income is No Shield Against Racial Differences in Lending (July 2007) (available at http://www.ncrc.org/index.php?option=com_content&task=view&id=231&Itemid=76); National Community Reinvestment Coalition, Income is No Shield Against Racial Differences in Lending II (July 2008) (available at http://www.ncrc.org/index.php?option=com_content&task=view&id=362&Itemid=88).

There is no dispute that the states have the authority to enact consumer protection and fair lending laws that apply to national banks. In informal opinions as well as regulations, however, the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) have broadly opposed the enforcement of state consumer protection and fair lending laws against national banks and thrifts. Courts have deferred to such rulings as the basis for disapproving state legislation and enforcement actions under existing state laws.[5] Although OCC contends that it is solely responsible for applying state fair lending and consumer protection laws to national banks, its internal manual for conducting fair lending investigations makes no reference to state law. OCC, Fair Lending Examination Procedures, Comptroller's Handbook (April 2006). Likewise, a General Accountability Office study reported that OCC examiners stated "that they generally did not have procedures for examining compliance with state laws." GAO, OCC Preemption Rules: OCC Should Further Clarify the

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[5] The scope of agency-advocated preemption is illustrated by several recent cases in which courts have extended federal preemption to non-banks acting as agents of banks. *See, e.g., Pacific Capital Bank, N.A. v. Connecticut*, 542 F.3d 341 (2d Cir. 2008) (application of state law limiting interest on tax refund anticipation loans preempted as to tax preparation firm); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 188 (2d Cir. 2007) (state regulation of gift card fees by agents of banks); *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) (same); *State Farm Bank, FSB v. Reardon*, 539 F.3d 336 (6th Cir. 2008) (state mortgage broker registration requirements preempted as to insurance agents acting on behalf of State Farm Bank).

Applicability of State Consumer Protection Laws to National Banks 23 (April 2006).[6] OCC created a regulatory vacuum.[7]

In 2005, after reviewing data disclosed pursuant to the Home Mortgage Disclosure Act (HMDA), the New York Attorney General requested information from four national banks concerning apparent racial disparities in mortgage lending. The letters invoked the Attorney General's authority to investigate violations of New York Executive Law § 296-a. The Clearing House Association and OCC filed suit to enjoin the Attorney General's fair lending investigation. Although the OCC itself agrees that investigation is warranted "where preliminary analysis of the HMDA data indicates elevated levels of fair lending risk,"[8] OCC made no claim that it was investigating the four banks for fair lending violations. Nor did OCC offer any concrete reason to

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[6] *See also* Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement: Hearing Before the Subcomm. on Oversight and Investigations, H. Comm. on Financial Services, 110th Cong. (July 25, 2007) (prepared testimony of Calvin Hagins, OCC Director for Compliance Policy, describing examination procedures) (Hagins testimony).

[7] Even if OCC had been more zealous in exercising its concurrent enforcement authority, there would still be a gap because OCC's enforcement power under 12 U.S.C. § 1818 is more limited than the powers state officials typically have to enforce state law. *Cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2619 (2008) (declining to read Clean Water Act as displacing federal common law punitive damages remedy and rejecting attempt to sever remedies from their cause of action).

[8] Hagins testimony at 2.

believe the New York Attorney General's investigation would interfere with its examination of the banks or with the banks' exercise of their federal banking powers.

Relying on an OCC regulation (12 C.F.R. § 7.4000) that purported to forbid state enforcement, *inter alia*, of state fair lending laws as "visitation" of national banks, the district court enjoined the investigation, and a divided panel of the Second Circuit affirmed. Pet. App. 2a-62a. The Second Circuit explicitly extended *Chevron* deference to OCC's interpretation of the governing statute (12 U.S.C. § 484). Pet. App. 31a.

SUMMARY OF THE ARGUMENT

Agency authority to preempt state law comes from Congress. The injunction forbidding the New York Attorney General's fair lending investigation rests not on the Second Circuit's own reading of an enactment of Congress and the application of constitutional preemption standards to a congressional decision to displace state law, but rather on *Chevron* deference to a 2004 OCC regulation (12 C.F.R. § 7.4000) forbidding state enforcement of non-discriminatory state laws of general application against national banks. Bank Activities and Operations, 69 Fed. Reg. 1895 (Jan. 13, 2004). Unlike regulations that may have the effect of preempting state law when courts apply established constitutional standards, OCC's visitorial powers regulation purports to decide the scope of preemption for itself. The power to decide the preemptive meaning of a statute is different from the power to

decide its substantive meaning. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744 (1996).

The Second Circuit below erred in extending *Chevron* deference to OCC's view of its own preemption authority because Congress never gave OCC policymaking discretion with regard to preemption. Preemption of state law is an important constitutional question, distinct from the agency's regulatory task. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) (Judicial Review) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration") (citation omitted). Such authority is not implicit in general agency authority to issue regulations.

The Second Circuit's error in applying *Chevron* deference is dispositive. The text and history of the statute granting OCC exclusive visitorial power over national banks does not support OCC's position. Moreover, this Court's decisions are inconsistent with OCC's view that all state regulation is impermissible visitation. In addition, the Second Circuit's decision ignores the checks this Court has imposed to ensure that congressional intent to displace state law is not lightly inferred. For Congress to broadly displace state regulatory enforcement by statute (as OCC has tried to do by regulation), a showing of "clear and manifest" intent to preempt the field is required. No less must be required to delegate preemption decisions across a field to an agency. Unlike Congress, which is politically accountable to the

states, agencies are comparatively insulated from such political accountability. Courts must therefore be no less protective of state interests when considering whether a statute allows an agency to make preemption calls than when considering whether Congress has directly preempted the field. Applying *Chevron* deference to such regulations would shift control over sensitive and constitutionally important relations between the federal and state governments from Congress, which is by constitutional design politically responsive to state concerns, to executive agencies which by design are insulated from them.

ARGUMENT

AN ADMINISTRATIVE AGENCY CANNOT FORBID STATE ENFORCEMENT OF NON-CONFLICTING AND NON-DISCRIMINATORY STATE LAW WITHOUT A CLEAR STATEMENT OF AUTHORITY FROM CONGRESS

The Supremacy Clause gives Congress the power to pass laws that trump conflicting state laws. Congress may choose to exercise that authority broadly, by carving out an entire legal domain for exclusively federal administration (field preemption), or more narrowly by enacting provisions eclipsing state laws that interfere with or frustrate the federal scheme (conflict preemption). Sometimes Congress explicitly addresses the preemptive effect of a law, for example, by "saving" state laws from preemption. More often, preemption follows from the predictable application by courts of legal rules that, broadly stated, weigh state and federal interests to determine whether the laws of both sovereigns may be

preserved. The question in this case is whether Congress also may preempt unwittingly by granting an agency general authority to issue regulations, if the agency then deploys its regulatory power to make preemption decisions Congress itself did not consider.

The OCC regulation at issue in this case is an example of a deregulatory preemption power asserted by a number of federal agencies in recent years. When agencies forbid state regulation in the absence of an effective federal regulatory regime the result can be, and was in this instance, a regulatory void. The exercise of preemption authority by federal agencies threatens the historic role of the states as "laboratories" to test solutions to new problems that Congress has not yet addressed legislatively. It also reduces the regulatory resources that are available to combat misconduct, disabling state agencies that often are more aware of and responsive to individual complaints than federal regulators.

A. Congress Did Not Preempt All State Regulation of National Banks.

Congress did not occupy the field of national bank regulation. Only five years after Congress enacted the National Bank Act (NBA), this Court explained that national banks "are subject to the laws of the State and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869). "This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." *Anderson Nat'l Bank v. Luckett*,

321 U.S. 233, 248 (1944). The national banking system was not premised on a set of comprehensive and uniform federal rules for national banks. Indeed, OCC would agree that adherence to state laws governing contracts, mortgages, foreclosures, security interests, and the like is vital to the operation of national banks, even though such laws vary from state to state.[9] To be sure, this Court also has extended protection to national banks against discriminatory state law, assuring that national banks may compete on equal terms with state-chartered banks. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003) (noting protection of national banks from "possibly unfriendly State legislation"). But states may nevertheless enforce generally applicable state laws against state and federally-chartered banks alike, "to the extent such laws do not conflict with the letter or the general purposes of the NBA." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11 (2007).

Congress also did not strip states of the power to enforce their laws against national banks (and

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[9] OCC contends that the hallmark of the "dual banking system" is the "uniformity of the standards" that govern national banks. 69 Fed. Reg. at 1896. However, OCC concedes that many state laws have always applied to national banks. *Id.* OCC attempts to draw a line between state laws that it deems the "infrastructure" of banking (which are not preempted), and other laws states may not enforce. But there is no principled distinction between "debt collection" laws which are deemed "infrastructure," and consumer protection laws, which are preempted as state regulation. *Id.* Similarly, OCC does not explain why subjecting national banks to state-enforced criminal laws squares with exclusive OCC visitation, but not state enforcement of regulations backed by non-criminal sanctions.

thereby occupy the field indirectly) by conferring exclusive "visitorial" power on the Comptroller of the Currency. The Comptroller's exclusive power of visitation, codified today at 12 U.S.C. § 484, was compatible with continued state regulation of national banks because not all regulation of banking is visitation. As explained in Petitioner's brief at pages 1-5 and 22-26, Congress used a customary term of corporate governance to refer to the examination of a bank for safety and soundness in compliance with its charter. "Visitation, in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of *its* laws and regulations." *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905) (emphasis added).[10] *See generally* Roscoe Pound, *Visitorial Jurisdiction over Corporations in Equity*, 49 Harv. L. Rev. 369, 389-90 (1936). There is no conflict between exclusively federal visitation to enforce the NBA charter and inspection of bank records to enforce compliance with distinct legal requirements. Indeed, *Guthrie* held that the NBA did not preempt a shareholder's suit in state court to enforce his right to inspect the books and records of a national bank because such an action is not a form of "visitation." *Guthrie* refutes the claim that any inspection of

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[10] *Guthrie* cited with approval *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-41 (C.C.N.D. Oh. 1881), which held that a state's request for information about depositors to enforce its tax laws was not prohibited "visitation." *Guthrie*, 199 U.S. at 158. Tellingly, in its discussion of Guthrie, OCC paraphrased the quotation as "*the* laws and regulations." 69 Fed. Reg. at 1899 (emphasis added).

national bank records other than by OCC is forbidden by the National Bank Act.[11]

The Court's decisions in *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), and *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944), show that states could enforce generally applicable state laws against national banks without interfering with the Comptroller's visitorial powers. In the *St. Louis* case, the Court upheld Missouri's lawsuit to enforce its prohibition against intrastate branching against a national bank. The fact that national banks did not then have affirmative power to establish interstate branches was relevant to whether the state prohibition was substantively preempted by federal law, but it was not relevant to whether the state (rather than the Comptroller) could bring an action to enforce non-preempted state law. After concluding that the state law was valid and did not conflict with federal law, the Court concluded as an obvious corollary that, "since the sanction behind it is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter." 263 U.S. at 660. OCC's position that state enforcement of state law through a judicial proceeding is impermissible visitation cannot be reconciled with the Court's decision in *First Nat'l Bank in St. Louis v. Missouri*.

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[11] *Guthrie*, of course, involved a private civil action, not enforcement of state law by state officials. But it is hard to see why judicial enforcement of state law is less intrusive when sought by an individual rather than by the state. This Court has often equated private civil enforcement with state regulation. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

In *Anderson*, the Court held that states could apply their unclaimed property laws to national banks. The Court expressly held that the state could "incident to this exercise of authority, require the banks to file reports of inactive accounts," 321 U.S. at 253, i.e., could demand production of bank records. That decision preceded by 38 years the enactment of a statutory exception to the Comptroller's visitorial powers for state escheat laws (12 U.S.C. § 484(b)).[12] The statute simply amplifies a longstanding judicial interpretation in order to quell disputes about the scope of state enforcement. Rather than implying that the scope of "visitation" is so broad that it would forbid state enforcement of unclaimed property laws if not for a statutory exception, the 1982 amendment shows that Congress ratified the Court's narrower interpretation of "visitation" that left ample room for state enforcement of state law.[13]

The 1994 Riegle-Neal Act confirms that OCC's exclusive visitorial power did not eclipse all state regulation. In Riegle-Neal, Congress explicitly provided that "[t]he laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-state national bank," except when otherwise

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[12] The Oregon Supreme Court had previously so held. *State v. First Nat'l Bank of Portland*, 123 P. 712 (Or. 1912).

[13] The OCC's explanation for the visitorial powers regulation erroneously relies on the 1982 amendment as support for its broad preemption claim. 69 Fed. Reg. at 1897. The OCC's Brief in Opposition to certiorari repeats this erroneous argument. BIO at 13, n.4. Neither discusses *Anderson*.

preempted. 12 U.S.C. § 36(f)(1)(A). Because the OCC had previously taken the position that it could not enforce state law, Congress clarified that "[t]he provisions of any State law to which a branch of a national bank is subject . . . shall be enforced, with respect to such branch, by the Comptroller of the Currency." 12 U.S.C. § 36(f)(1)(B). Nothing in the text of the statute indicates that Congress intended OCC enforcement to be exclusive.

The legislative history of the Riegle-Neal Act also confirms that Congress did not intend to eliminate state regulatory authority over national banks. "States have a strong interest in the activities and operations of depository institutions doing business in their jurisdictions, regardless of the type of charter the institution holds." H.R. Conf. Rep. 103-651, 45 (1994). The report discussed the application of conflict preemption to state law. "In this regard, the impact of a State law on the safe and sound operations of a national bank is one factor that may be taken into account in considering whether Federal law preempts state law. Courts generally use a rule of construction that avoids finding a conflict between Federal and State law where possible. This title does not change these judicially established principles." *Id.* The report went on to fault OCC for its overly aggressive assertion of federal preemption to block state consumer protection enforcement, (*id.*) -- a criticism that is incompatible with the claim that Congress intended to vest sole consumer protection enforcement power in OCC to the exclusion of the states.[14]

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[14] *National State Bank v. Long*, 630 F.2d 981 (3d Cir. 1980), had previously held that New Jersey's anti-redlining law applied

B. *Chevron* Deference is Not Owed to An Agency's View of Its Statutory Authority to Preempt.

The rationale for *Chevron* deference to agency decision-making is not always clear in this Court's cases. *See* Judicial Review, at 369 (describing interpretive and law declaring approaches). Some opinions can be read to suggest a broad quasi-judicial interpretive role, in which agencies authoritatively construe ambiguous statutory terms. That rationale, however, conflicts with the rationale of the Court's decision in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), because giving precedence to agency interpretations that conflict with judicial rulings would encroach on the judicial power "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Chevron deference, properly understood, must be grounded in the policymaking discretion conferred by Congress when it deliberately leaves gaps in statutory schemes to be filled in by agencies, the same rationale this Court adopted when it held that

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to a national bank (except for certain reporting requirements substantively preempted by HMDA), but that only OCC could enforce as to national banks. The Third Circuit deferred to an interpretative ruling by the OCC which the court deemed, in the circumstances of the case, to be a "reasonable interpretation of the National Bank Act." 630 F.2d at 989. Nothing in the text or the legislative history of the Riegle-Neal Act indicates that Congress approved of and intended to codify a single judicial decision relying on OCC's own preemption analysis. *Long* also cannot be said to have "settled the meaning of an existing statutory provision." *United States v. Hayes*, No. 07-608, slip op. at 8 (Feb. 24, 2009) (citations omitted).

regulations could preempt state law. *United States v. Shimer*, 367 U.S. 374, 383 (1961) (an agency may promulgate a regulation having the force of law and thereby preempting contrary state law); *Chevron, U.S.A., Inc., v.* NRDC, Inc., 467 U.S. 837, 843-45 (1984) (citing *Shimer* at 845). Under that analysis, unless Congress has intentionally and explicitly conferred policy-making discretion with regard to the preemption of state law, as discussed in section C, below, no deference is owed to an agency's decisions regarding preemption.

1. "The whole point of *Chevron* is to leave the discretion provided by the ambiguities of the statute with the implementing agency." *United States v. Eurodif, S.A.*, 129 S. Ct. 878, 887 (2009) (quoting *Smiley v. Citibank*, 517 U.S. 735, 742 (1996)). The power to execute federal law "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339, 2345 (2007) (citations omitted). *See also Zuni Public Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 550 U.S. 81 (2007) (regulation involves the kind of "highly technical, specialized . . . matter that Congress often does not decide itself, but delegates to specialized agencies to decide."). In short, *Chevron* is explained by deference to determinations Congress did not make itself, but rather left open to the agency. *Chevron*, , 467 U.S. at, 843.

Nothing in *Chevron* requires the courts to abdicate their own constitutional authority "to say what the law is." *Marbury v. Madison*, 5 U.S. 137,

177 (1803). *Chevron* notes that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n.9. *Cf.* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 215 & n.54 (2001); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 476 (1989); Judicial Review, at 381 ("If taken literally, the Court's language suggests a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or administrative perspective.")

This Court's decision in *Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005), necessarily depends on deference based on discretionary policymaking rather than to an agency's interpretation of the meaning of a statute. In *Brand X*, the Court deferred to the FCC's determination that cable Internet services should be regulated as "information services" rather than "telecommunications services." Along the way, the Court ruled that an agency's prior adoption of an inconsistent position "is not invalidating" (quoting *Smiley*, 517 U.S. at 742), and that an agency is free to update or modify its regulations based on changed circumstances or a change in administrations. *Id.* at 81. Since new facts or a new administration cannot possibly change what Congress meant when it passed a law, it is clear that *Chevron* deference is about discretion to make policy judgments that may change with circumstances, rather than to interpretations of

statutory language that do not.[15] An explication of a new policy in light of new facts, for example, need not contradict the old policy. *Chevron* operates in a realm where there is no one right answer, because Congress deliberately left its meaning uncertain.

The same conclusion about the nature of *Chevron* deference follows from the Court's holding in *Brand X* that a court must defer to an agency under *Chevron* even if the court has previously adopted a different interpretation of the same statute. The judicial power of the United States resides in the Article III courts, and courts are not subject to overruling by Article II agencies on questions of federal law. But questions that Congress has left open for agency policymaking cannot be given a fixed interpretation by a court, any more than by an agency. An agency's subsequent policy decision can trump a court's prior analysis of a statute precisely because Congress has given the agency policy discretion to make rather than interpret law.

2. *Chevron* deference does not apply to OCC's visitorial powers regulation because Congress did not give OCC discretion to make its own preemption policy. "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers

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[15] Indeed, this Court has repeatedly observed that for courts, "[c]onsiderations of stare decisis are particularly forceful in the area of statutory construction," because Congress can legislate to overturn an interpretation with which it disagrees. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

power upon it." *City of New York v. FCC*, 486 U.S. 57, 66 (1988) (quoting *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). Congress enacted a statute giving OCC the general power to issue regulations. 12 U.S.C. § 93a.[16] That statute does not refer to preemption and it confers no authority to decide preemption issues. *Cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (delegation to Secretary of Labor did not encompass authority to decide whether federal right of action preempted conflicting state workers' compensation laws).

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[16] Section 93a provides:

> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the "Glass-Steagall Act".

Because section 36 is excluded, the OCC visitorial powers regulation cannot be defended as an implementation of the provisions of 12 U.S.C. § 36(f) regarding OCC enforcement of state fair lending laws. Other Riegle-Neal provisions confirm that Congress did not intend to delegate authority to OCC to promulgate regulations having the force of law (and subject to *Chevron* deference) regarding preemption. 12 U.S.C. § 36(f)(1)(C) requires OCC to report on actions concerning the application of state law. 12 U.S.C. § 43 in turn refers to OCC opinions and interpretive rules concerning preemption, not to regulations having the force of law. Congress expected OCC to continue its practice of issuing such opinions and interpretive rules, rather than to short-circuit judicial analysis by issuing regulations.

Congress' use of the term "visitation" – even if ambiguous -- does not imply that Congress wanted OCC to decide for itself whether states could enforce state laws applicable to national banks. "*Chevron* deference is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 245, (2006). It follows from the analysis in section B.1 above that statutory ambiguity is not enough, by itself, to trigger *Chevron* deference. Congress at times enacts provisions of less-than-perfect clarity without intending any delegation of policymaking authority. *See, e.g., United States v. Hayes*, No. 07-608, slip op. at 6-7 (Feb. 24, 2009) (noting "less-than meticulous-drafting"). The ultimate question is whether Congress intended to leave certain matters undecided for resolution by the agency, not whether Congress could have drafted the statute better.

As this Court explained in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), some matters are too important be infer that Congress implicitly delegated their resolution to an agency by ambiguous language. "In extraordinary cases," the Court noted, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* (citation omitted). There is such a reason to hesitate before inferring that Congress intended to delegate power to an agency to alter the balance between the state and federal governments by preempting state law. Having chosen to create a national banking system that remained substantially governed by state law (and, indeed, expressly to make certain state law applicable to national banks), "Congress could not

have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160 (citation omitted).

Decisions to preempt state law (or a state's enforcement of its own law) by regulation are different from the adoption of regulatory standards that may have a preemptive effect. Equating the visitorial powers regulation with the more typical regulatory standard that has a preemptive effect, "confuses the question of the substantive (as opposed to pre-emptive) meaning of a statute with the question of whether a statute is pre-emptive." *Smiley*, 517 U.S. at 744. In *Smiley*, the Court "assume[d] (without deciding) that the latter question must always be decided de novo by the courts." *Id.* When the regulation operates directly on state law (as the visitorial powers regulation does by forbidding state enforcement) the agency itself is deciding the preemptive meaning of the statute. Put bluntly, the OCC visitorial powers regulation regulates states, not banks.[17]

References to agency intent to preempt in *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982), and *City of New York v. FCC*, 486 U.S. 57 (1988), do not suggest that courts must defer to an agency's view of its authority to issue preemption-deciding regulations. The policymaking discretion involved in *de la Cuesta* and *City of New*

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[17] For this reason, the statement in *de la Cuesta* that, "[a] preemptive regulation's force does not depend on express congressional authorization to displace state law," 458 U.S. at 154, does not apply to the OCC visitorial powers regulation.

York was the discretion to adopt uniform regulatory standards. There was no question in either case about whether Congress had intended to give the agency the authority to adopt national standards that would thereby preempt contrary state law. *City of New York*, 486 U.S. at 66-67 (Congress ratified FCC's practice of preempting local technical standards for cable service); *de la Cuesta*, 458 U.S. at 162 ("statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law."). However, Congress foreclosed adoption of uniform national standards like those adopted in *de la Cuesta* and *City of New York*, when it made state consumer protection and fair lending laws applicable to national banks, so delegated authority to preempt cannot be predicated on standard-setting power.

In *de la Cuesta* the Court held that a Federal Home Loan Bank Board regulation authorizing federal thrifts to include "due on sale" clauses preempted California law limiting enforcement of such clauses. Likewise, in *City of New York*, the Court held that FCC regulations establishing uniform national cable television standards preempted different local standards. The agency intent to preempt discussed in those cases is just another way of asking whether state law conflicted with the purpose of the regulation (triggering "obstacle" preemption), because it was *possible* to comply with both the state law and federal regulations. In *de la Cuesta*, the agency concluded that elimination of "due on sale clauses" would "have an adverse [effect] on the earning power and financial stability of Federal associations," and would dry up

mortgage credit. 458 U.S. at 168. The California law conflicted with the federal regulation because it denied federal thrifts "flexibility" in mortgage lending that the agency had intended to protect. Similarly, in *City of New York*, the FCC explicitly adopted standards that were intended to be uniform across the nation to avoid the "serious negative consequences" of technical standards that varied from place to place. 486 U.S. at 65. In that context, deference to "the agency's choice to pre-empt" refers to the choice to adopt a uniform standard, not to decide for itself the preemptive consequence of that standard.

3. Even if *Chevron* deference were rooted in agency expertise rather than delegated statutory gap-filling, there would be no reason to defer to OCC's regulation. OCC "accretes a great deal of regulatory authority to itself at the expense of the states through rulemaking lacking any real intellectual rigor or depth." Pet. App. 26a; *id.* (referring to the regulation as "at or near the outer limits" of *Chevron*). OCC has no expertise in constitutional adjudication, including the application of the Supremacy Clause to conflicts between federal and state law. *Id.* at 25a. Nor is agency banking expertise involved. As the Second Circuit noted, OCC's rationale for the regulation is not rooted in its experience with the examination of national banks. Pet. App. 25a. OCC has not claimed that legitimate state fair lending investigations would impede the banking activities of national banks. Nor does OCC claim that such investigations have interfered with its own visitorial functions.

C. Agencies Lack the Authority to Issue Regulations That Decide the Scope of Preemption Unless Congress Has Expressly Authorized Such Regulations.

The same clear statement rules should apply to statutes that are invoked as agency authority to explicitly preempt state law as apply to field preemption. The authority to fill statutory gaps with regulations must originate with Congress. A delegation of authority to an agency to dictate by regulation what non-conflicting state laws are preempted is really a form of field preemption, because the agency then has policymaking discretion to preempt (or not) any state law within the scope of the delegation. The form of preemption asserted by OCC, in particular, is based on the claim that Congress has preempted the entire field of state enforcement by conferring exclusive "visitorial" power on OCC. Because States traditionally have the responsibility for enforcing their own laws, and there is no claim (in light of the explicit contrary language in the Riegle-Neal Act) that the state laws themselves are preempted, "clear and manifest" congressional intent is required to preempt the field of state enforcement. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 69 (2002) (citation omitted) (standard for preempting a traditional field of state concern). Section A shows that Congress did not intend to occupy the entire field of banking regulation, leaving ample room outside OCC visitation for regulatory enforcement by the states.

No less clarity must be required of Congress when it preempts a field by authorizing agency preemption than when it does so directly. A general statute authorizing an agency to promulgate regulations, like 12 U.S.C. § 93a, does not imply that "clear and manifest" intent to allow an agency to decide whether state laws are preempted. Allowing agencies to exercise such authority in the absence of an explicit grant of preemptive power by Congress would weaken an important structural constitutional protection of state sovereignty, because that would allow agencies to make preemption decisions even if Congress never considered the matter. Agencies lack the "procedural safeguards" inherent in the constitutional structure of the Congress to protect state interests.

In *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52 (1985), the Court recognized that the composition of Congress, and, in particular, the election of Senators as representatives of the States, helps to assure that state interests are given appropriate weight in federal legislation. *See also United States v. Morrison*, 529 U.S. 598, 628, 649 (2000) (Souter, J., dissenting). Members of Congress often have served in state offices before and after congressional service, and may have close political and personal ties to state officials. Perhaps even more important, members of Congress are elected by, and therefore politically accountable to, the same voters who elect the state legislators whose enactments would be preempted, denying those voters state law protections.

Whether or not the structural safeguards against congressional infringement of state sovereignty are deemed sufficient for all purposes, those safeguards are much more protective of state interests than the indirect responsiveness of federal agency officials by virtue of their accountability to the President and to Congress. Even the most senior agency officials are several steps removed from the states. *See* Barron & Kagan, at 243-44 (describing political accountability of the most senior agency officials). Rulemaking requirements such as Executive Order 13132, requiring agencies to discuss the federalism implications of a rule, have had little effect, as illustrated by OCC's pallid treatment of state interests in its discussion of the visitorial powers rule. 69 Fed. Reg. at 1903. *See* Nina Mendelson, *A Presumption Against Preemption*, 102 Nw. U. L. Rev. 695, 718-21 (2008).

* * *

Congress itself, not the agency, must decide if state laws should give way to a federal scheme. Agency preemptive rulemaking may operate only within the interstices of a statute that clearly confers such authority.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C.
AND
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the National Association of REALTORS® ("NAR")[2] is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. Its members are bound by a strict Code of Ethics to ensure professionalism and competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,500 local Associations of REALTORS®, and approximately 1.3 million REALTOR® and REALTOR-ASSOCIATE® members.

NAR represents the interests of real estate professionals and real property owners in important matters before the legislatures, courts, and executives

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief. Counsel for respondent the Clearing House Association, L.L.C. has filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs, and letters reflecting the consent of both petitioner and respondent Office of the Comptroller of the Currency have been filed with the Clerk.

[2] REALTOR® is a federal registered collective membership mark used by members of NAR to indicate their membership status.

of the federal and state governments. The issues presented in those matters include fair lending practices, equal opportunity in housing, real estate licensing, neighborhood revitalization, housing affordability, and cultural diversity. NAR has previously participated as *amicus curiae* in numerous cases before this Court, including, *e.g.*, *Glenmont Hills Associates Privacy World at Glenmont Metro Centre v. Montgomery County*, 128 S. Ct. 2914 (2008); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 547 U.S. 715 (2006); *Lincoln Property Co. v. Roche*, 546 U.S. 81 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Yee v. City of Escondido*, 503 U.S. 519 (1992).

NAR seeks an end to discriminatory practices in mortgage lending, in order to ensure the ample availability of funds for mortgage lending, among other objectives. The livelihood of NAR's members is enhanced by lending practices that are fair, transparent, and nondiscriminatory. Such lending practices ensure that mortgages will be available to the maximum number of qualified consumers who wish to purchase homes. Home ownership is in the best interest of the country as a whole as well as to NAR, and it continues to be recognized as a favored public policy goal at both the federal and state levels. In contrast, when national banks discriminate in their mortgage lending, fewer funds are available

for home purchases. State antidiscrimination laws apply to national banks and play an important role in fighting discriminatory lending practices. These laws are most effectively enforced by the States themselves. Therefore, enforcement of state antidiscrimination laws by the States is crucial to ensuring that national banks observe fair, transparent, and nondiscriminatory lending practices. Such enforcement also ensures that they do not obtain a competitive advantage over competitors that remain subject to state enforcement actions.

NAR's interests in this case also arise from its status as a leading advocate for housing issues and its substantial and longstanding commitment to affordable housing, equal opportunity in housing, and fair housing compliance. These concerns are also acutely affected by and related to the mortgage lending issues at the core of this case. To the extent the decision below denies States the authority to enforce their fair lending statutes, the housing interests of NAR and its members may be similarly compromised. In addition, the broad scope of authority the Office of the Comptroller of the Currency ("OCC") asserts in this case has widespread implications for state enforcement of other state statutory and regulatory schemes that may be applicable to NAR's members.

SUMMARY OF ARGUMENT

This case concerns the OCC's effort to divest States of their authority to enforce against national banks and their various operating subsidiaries those state laws that the National Bank Act does *not* preempt. The OCC concedes that national banks and their operating subsidiaries must abide by such laws like the New York antidiscrimination laws at issue in this case and can be punished for violating those laws. But the OCC has promulgated a regulation, 12 C.F.R. § 7.4000, that purports to grant it the "exclusive authority" — rather than concurrent authority — to enforce such laws. There appears to be no precedent for a regime where a State's legislature has authority to pass laws that its executive cannot enforce. And nothing in the National Bank Act authorizes the OCC to create such a regime.

I. A. It has long been recognized that agencies frequently act to augment their own power and authority. Such self-interested actions should be viewed with special skepticism under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), particularly when they entail overt attempts to enhance an agency's budgetary authority and financial resources. Such financial incentives can skew the evenhanded approach Congress expects in the implementation of congressional policy.

B. The OCC's budget derives almost entirely from its assessments on banks that have chosen to be nationally chartered, rather than state chartered. As the OCC itself acknowledges, it has a strong incentive to promulgate rules that entice banks to exchange state charters for national charters. Indeed, the OCC views itself as in competition with the States. But the OCC's budgetary incentives conflict

with Congress's historical policy of competitive equality between the federal and state banking systems.

C. Section 7.4000 is part of the OCC's efforts to entice banks to adopt national charters. The practical effect of § 7.4000 is to insulate national banks from the enforcement of state laws that those national banks are bound to obey. In contrast to States, which brought more than *4,000* enforcement actions in 2003, the year before § 7.4000 took effect, the OCC has concluded only *four* enforcement actions to protect consumers from abusive practices in the past five years. Nor is the OCC equipped to monitor, understand, and enforce 50 different States' generally applicable laws, to which national banks and their operating subsidiaries are subject. The OCC's action, though consistent with its budgetary incentives, is directly contrary to Congress's "policy of competitive equality" between state-chartered and nationally chartered banks, which is "firmly embedded in the statutes governing the national banking system." *First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 133 (1969). The effect on the dual-banking system, as well as the OCC's budgetary self-interest, are significant reasons to view § 7.4000 with skepticism rather than deference under *Chevron*.

D. The OCC's claim of exclusive authority to enforce state laws extends well beyond the traditional banking activities of national banks and reaches every activity that the OCC has authorized national banks and their operating subsidiaries to undertake. Thus, the OCC's rule purports to divest states of the right to enforce non-preempted laws governing such diverse activities as selling long-term health care and disability insurance, developing commercial buildings and managing residential condominiums in

those buildings, and providing Web design services. The multitude of companies that compete to provide these same services — and that are owned by state banks or no bank at all — remain subject to state enforcement actions, while their competitors owned by national banks are not. That disparity creates a further incentive for state banks to adopt national charters and for companies to become subsidiaries of national banks.

II. A. In all events, § 7.4000 is unlawful. By stripping States of the right to enforce their own laws, § 7.4000 alters the federal-state balance of power. To effect such a rebalancing of power, Congress must make its intention to do so unmistakably clear. This clear-statement requirement has additional force when a federal agency — and not Congress — seeks to alter the federal-state balance of power. Allowing a federal agency to strip States of their powers without express authorization from Congress blurs lines of political accountability.

B. The clear-statement rule is particularly important in this case, where the OCC's regulation divorces the right to enact a law from the power to enforce it. As this Court recognized long ago, the "fallacy" in such a separation is "made apparent by the mere statement of the proposition," because the State executive's power to enforce its legislature's laws "is essentially inherent in the very conception of law." *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds). Even assuming Congress could create such an unprecedented rule, Congress could not do so through implication, and federal agencies should not be assumed to have received implicitly delegated power to strip States of basic sovereign

rights. Accordingly, there is no basis in these circumstances for granting *Chevron* deference to the OCC's regulation.

C. Congress did not clearly grant the OCC the right to claim exclusive authority to enforce those state laws with which national banks and their operating subsidiaries must comply. The OCC relies on its exclusive "visitorial powers" over national banks, 12 U.S.C. §§ 481, 484(a), but those "visitorial powers" have never been understood to preclude a State from seeking "to vindicate and enforce its own law" when "the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation." *St. Louis*, 263 U.S. at 660. The OCC also relies on 12 U.S.C. § 1818(b), but Congress there gave the OCC only concurrent — not exclusive — authority to enforce state laws against national banks and their operating subsidiaries.

ARGUMENT

I. THE OCC HAS MADE A CONCERTED AND SELF-INTERESTED EFFORT TO INSULATE NATIONAL BANKS FROM STATE REGULATION

The *Chevron* question in this case stems from the OCC's decision to assert preemptive enforcement authority over concededly non-preempted state laws. In evaluating the OCC's authority, it is important to place that assertion of agency power in its proper context. Courts and commentators have recognized the tendency of federal agencies to augment their power and explained why claims of *Chevron* deference may be suspect in such circumstances. In the OCC context, that skepticism should be amplified by

the massive financial incentives under which the OCC operates.

A. Agency Claims For *Chevron* Deference Should Be Viewed With Special Skepticism When Its Actions Aggrandize Agency Power

Courts have acknowledged "the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 (3d Cir. 1981). Leading commentators explain that "agencies are peculiarly susceptible . . . to act in their own interests." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 447 (1987). That is especially true when those interests are financial: the "goals of the bureaucrat are most closely associated with the size of the bureau's budget." Dennis C. Mueller, *Public Choice* 156-70 (1979); *see* William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36-42 (1971).

When an "agency's self-interest is so conspicuously at stake," courts should not accord the agency's views *Chevron* deference. Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 210 (2006); *cf. Mesa Air Group, Inc. v. Department of Transp.*, 87 F.3d 498, 503 (D.C. Cir. 1996) (applying "neutral principles of contract law, not the deferential principles of regulatory interpretation," to contracts between the agency and private entities); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[I]f the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract."). In such

cases, there is a substantial risk that "the decision to regulate may be motivated by designs for agency aggrandizement rather than by a disinterested assessment of statutory authority and appropriate policy." Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 1024 (1992); *see also* Sunstein, 101 Harv. L. Rev. at 467 ("foxes should not guard henhouses").

Those principles apply with special force in this context, because the OCC has significant budgetary incentives to lure banks to be nationally chartered and to relieve those banks of state-law liability.

B. The OCC Is Funded Almost Entirely By Banks That Choose To Obtain National Charters

Congress does not provide the OCC with annual appropriations.[3] Instead, the Comptroller has statutory authority to "impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the office of the Comptroller." 12 U.S.C. § 482. The Comptroller levies a semiannual assessment on all nationally chartered banks, using a fixed fee schedule.[4] Therefore, the greater the number and size of banks with national charters, the larger the OCC's budget.[5] For fiscal year 2007, the OCC's total revenue (and, therefore, its budget) was $695.4 million, $666 million (or

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[3] *See* OCC, *Annual Report – Fiscal Year 2007*, at 70 (Nov. 2007) ("*OCC FY2007 Report*"), *available at* http://www.occ.gov/annrpt/2007AnnualReport.pdf.

[4] *See* 12 C.F.R. § 8.2(a) (highest assessment rates are paid by national banks with assets over $250 billion).

[5] *See generally* OCC, *Semiannual Assessment* (updated Dec. 1, 2008), *at* http://www.occ.gov/assess.htm.

nearly 96 percent) of which came from assessments on national banks.[6]

Because its budget depends almost entirely on assessments on national banks — and because banks have the option to operate under state or national charters[7] — the OCC has a strong incentive to promulgate rules and to operate in a manner that entices banks to obtain and maintain national charters, as opposed to state charters. The OCC views itself as engaged in competition with the States to convince banks to opt for (or to convert to) national charters rather than state charters. The Comptroller at the time the OCC promulgated the rule at issue here had stated that the potential of losing regulatory "market share" to the state banking system was "'a matter of concern to us.'"[8] As a result, he said, "the OCC has aggressively supported the preemption of state laws in order to keep national banks . . . from converting to state charters" — thereby reducing the OCC's resources — and to persuade state banks to adopt national charters.[9] As he acknowledged, the preemption of state regulatory authority "provides an incentive for banks to sign up with the OCC . . . . 'It is one

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[6] The remainder of the OCC's budget comes from investment income and bank licensing fees. *See OCC FY2007 Report* at 70 & table 9.

[7] *See* 12 U.S.C. § 24; *see also Franklin Nat'l Bank of Franklin Square v. New York*, 347 U.S. 373, 375 (1954).

[8] Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers*, Wall St. J., Jan. 28, 2002, at A1 (quoting Comptroller John D. Hawke, Jr.).

[9] Remarks by John D. Hawke, Jr., Comptroller of the Currency, Before the Women in Housing and Finance at 2 (Feb. 12, 2002) ("Hawke Remarks"), *reprinted in* OCC News Release 2002-10, *available at* http://www.occ.treas.gov/ftp/release/2002-10a.doc.

of the advantages of a national charter, and I'm not the least bit ashamed to promote it.'"[10]

Although the OCC has a clear incentive to regulate in a manner that makes national charters preferable to state charters, Congress has followed a "policy of equalization" designed to maintain a basic parity of competitive opportunities between national and state banks. *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). Thus, while "the Federal Government is a rival chartering authority for banks," *Franklin Nat'l Bank*, 347 U.S. at 375, Congress has long pursued a policy of preserving this nation's "dual-banking system" by seeking to ensure a competitive balance between the two systems, *see, e.g., Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *see also First Nat'l Bank in Plant City v. Dickinson*, 396 U.S. 122, 133 (1969) ("The policy of competitive equality is . . . firmly embedded in the statutes governing the national banking system."). Regulatory efforts that disrupt that balance — like § 7.4000 — are contrary to Congress's longstanding policy goals in this area.

C. Section 7.4000 Is Part Of The OCC's Efforts To Entice State-Chartered Banks To Obtain National Charters

Since 1966, the OCC has had concurrent authority with the States to enforce state laws against national banks and their operating subsidiaries.[11] *See* Cuomo

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[10] Bravin & Beckett, *supra* note 8, at A1 (quoting Comptroller Hawke).

[11] The OCC defines an "operating subsidiary" of a national bank to include any state-chartered "corporation, limited liability company, limited partnership, or similar entity" that engages in only those "activities that are permissible for a national bank

Br. 7-9. Congress has expressly authorized the OCC to initiate cease-and-desist proceedings to remedy a violation of *any* "law, rule, or regulation," which includes violations of state laws that the National Bank Act does not preempt. 12 U.S.C. § 1818(b); *see National State Bank v. Long*, 630 F.2d 981, 988 (3d Cir. 1980) ("[t]he legislative history of the Act indicates that Congress was concerned not only with federal but with state law as well"). That is because "[f]ederally chartered banks are subject to state laws of general application in their daily business to the extent such laws do not conflict with the letter or the general purposes of the [National Bank Act]." *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1567 (2007). States "are permitted to regulate the activities of national banks where doing so does not prevent or significantly interfere with the national bank's or the national bank regulator's exercise of its powers." *Id.*

Pursuant to that long-recognized authority, States have routinely enforced their nondiscrimination and consumer protection laws against national banks.[12]

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to engage in directly" and that is "control[led]" by a national bank. 12 C.F.R. § 5.34(e)(1)-(2).

[12] *See, e.g., Minnesota ex rel. Hatch v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001) ("[f]ederal law does not require that the OCC have exclusive enforcement" of state fraud and deceptive trade practices laws against "national banks and their branches"); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516, 526 (W. Va. 1995) ("Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the [state consumer protection act] did not include lawsuits against [national banks], these institutions could, if unsavory, run in effect a 'laundry' for 'fly-by-night' retailers that seek to excessively charge their customers."); *State v. Ameritech*, 532 N.W.2d 449, 451 (Wis. 1995) (per curiam) (affirming the naming of Household Bank, N.A. as

In 2003, the last full year before § 7.4000 went into effect — and the OCC for the first time claimed exclusive authority to enforce state laws against national banks and their operating subsidiaries — state bank supervisory agencies performed more than 20,000 investigations in response to consumer complaints about abusive lending practices, and those investigations produced more than 4,000 enforcement actions.[13]

In contrast, the OCC has initiated very few actions against national banks and their subsidiaries for infractions of the 50 States' different laws. The OCC identifies only *four* enforcement actions that it "has taken against banks engaged in abusive practices" since promulgating § 7.4000 in 2004.[14] Nor is the OCC equipped to monitor, understand, and enforce the 50 States' different laws, particularly in comparison with the 50 States' supervisory agencies and attorneys general. The OCC attorneys detailed to compliance matters nationwide number only in the "dozens."[15] Yet, on consumer issues alone, the OCC

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a defendant in a case involving advertising and marketing); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 408 (Alaska 1982) (Alaska sued a national bank in connection with its role as a financer of a real estate development — an authorized banking activity).

[13] *See Views and Estimates of the H. Comm. on Fin. Servs. on Matters To Be Set Forth in the Concurrent Res. on the Budget for Fiscal Year 2005*, 108th Cong. 16 (Comm. Print 2004), *available at* http://financialservices.house.gov/media/pdf/FY2005%20Views_FINAL.pdf.

[14] OCC, *Consumer Protection News: Unfair and Deceptive Practices*, *at* http://www.occ.treas.gov/consumer/unfair.htm (visited Feb. 25, 2009).

[15] Remarks by Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the

receives roughly 70,000 complaints and inquiries each year.[16] Those complaints are handled by a single office of the OCC,[17] which in 2005 had only 50 employees in total.[18] In contrast, "State banking agencies and State attorneys generals' offices employ nearly 700 full time examiners and attorneys to monitor and enforce consumer law compliance."[19] The OCC's assignment of staff to the protection of consumers reflects an OCC policy priority: "[u]nlike consumer advocates and state attorneys general, OCC defines itself as a neutral arbiter in terms of assisting consumers."[20] Such "neutrality," however, is tantamount to neglect of consumer protection.

Currency, *Preemption and the Evolving Business of Banking*, Before the New York Bankers Ass'n Financial Services Forum at 5 (Mar. 25, 2003), *available at* http://www.occ.treas.gov/ftp/release/2004-25a.pdf.

[16] *See Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Servs.*, 110th Cong. 140 (2007) (statement of John C. Dugan, Comptroller of the Currency), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37556.pdf.

[17] *See* Gov't Accountability Office, *OCC Consumer Assistance: Process Is Similar to That of Other Regulators but Could Be Improved by Enhanced Outreach* 2 (2006) ("*OCC Consumer Assistance*"), *available at* http://www.gao.gov/new.items/d06293.pdf.

[18] *See Credit Card Practices: Current Consumer and Regulatory Issues: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 80 (2007) (statement of Arthur E. Wilmarth, Jr., Professor of Law, George Washington University Law School), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:36821.pdf.

[19] *OCC Consumer Assistance* at 16.

[20] *Id.* at 23.

The effect — if not the intention — of § 7.4000 is to insulate national banks and their operating subsidiaries from the enforcement of applicable state laws. In proposing § 7.4000 and related regulations, the OCC touted them as part of an effort to create "a 'complete' national banking system, free from state control, and subject to uniform, national standards."[21] The Comptroller who promulgated those rules touted the "major advantage of the national charter" as the freedom "to conduct a multistate business subject to a single uniform set of federal laws, under the supervision of a single regulator, free from visitorial powers of various state authorities."[22] But the only way to offer national banks such "uniform, national standards" is for the OCC to leave unenforced the varying laws of the 50 States that are not preempted and to which national banks remain subject.

At the same time, States retain authority to enforce those laws against the national banks' competitors, including state-chartered banks and the numerous commercial entities that compete with national banks' operating subsidiaries. As a former Chairman of the Federal Deposit Insurance Corporation ("FDIC") explained: "The facts of life today with regard to preemption are fairly simple. A state-chartered bank that wants to do business across state lines is at a substantial competitive disadvantage relative to a national bank."[23] That dynamic has caused the

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[21] *Bank Activities and Operations; Real Estate Lending and Appraisals*, 68 Fed. Reg. 46,119, 46,129 (Aug. 5, 2003).

[22] Hawke Remarks at 2.

[23] Remarks by Donald E. Powell, Chairman, FDIC, Before the American Bankers Association Annual Convention at 2

share of banking activity that state-chartered banks conduct to "dwindl[e]," with "every reason to believe that trend will continue."[24]

Indeed, § 7.4000 had its desired effect of promoting the OCC's efforts to market national charters to banks. In fiscal year 2005, the OCC recorded a 15-percent increase in assessment revenues.[25] The OCC attributed that revenue growth to "new large banks joining the national banking system" following the promulgation of regulations like § 7.4000.[26] Indeed, many of the largest banks publicly supported the OCC's adoption of § 7.4000[27] and then converted from state to national charters thereafter.[28]

The OCC's self-serving accretion of power through the promulgation of § 7.4000 violates "[t]he policy of competitive equality" between state-chartered and nationally chartered banks, which is "firmly embed-

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(Sept. 26, 2005), *available at* http://www.fdic.gov/news/news/speeches/archives/2005/chairman/spsept2605.html.

[24] *Id.* at 1.

[25] OCC, *Annual Report – Fiscal Year 2005*, at 62 & table 9 (Oct. 2005) (reporting that the OCC's assessment revenues rose from $482.3 million in fiscal year 2004 to $557.8 million in fiscal year 2005), *available at* http://www.occ.treas.gov/annrpt/2005AnnualReport.pdf.

[26] *Id.* at 62.

[27] *See* Todd Davenport, *Are States, OCC Near a Preemption Showdown?*, American Banker, Nov. 5, 2003, at 1 (reporting that, "[t]o nobody's surprise, large national banking companies such as Bank of America Corp., Wells Fargo & Co., Wachovia Corp., Bank One Corp., and National City Corp. wrote long comment letters" in support of the OCC's rulemaking proposal).

[28] Laura Thompson Osuri, *Trustmark of Miss. Sticking with OCC*, American Banker, Sept. 20, 2004, at 5 (reporting that J.P. Morgan Chase, HSBC, and Harris Bank had converted from state to national charters in 2004).

ded in the statutes governing the national banking system." *Dickinson*, 396 U.S. at 133. In fact, so "firmly embedded" is "the congressional policy of competitive equality with its deference to state standards," that it is not "open to modification by the Comptroller of the Currency." *Id.* at 138. Despite the OCC's natural, perhaps even understandable, inclination to aggrandize its power and budget by enticing banks to obtain national charters, the courts must reign in the OCC's actions when, as here, they conflict with congressional policy.

D. The OCC's Attempt To Exclude State Enforcement Of State Law Is Particularly Problematic Because It Extends Well Beyond Traditional Banking Activities

The harmful effects of § 7.4000 are magnified by the OCC's expansive interpretation of the "business of banking." As this Court has held, the OCC "has discretion to authorize [national banks to undertake] activities beyond those specifically enumerated" in the National Bank Act,[29] so long as they are among the "incidental powers . . . necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). In recent years, the OCC has read the "incidental powers" language extremely broadly and thereby expanded its regulatory reach into areas that, at best, are only tangentially related to the business of banking.

For example, the OCC has concluded that national banks' "incidental powers" extend to providing coun-

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[29] *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995).

seling to Medicare and Medicaid recipients,[30] selling long-term care and disability insurance,[31] operating roadside assistance programs,[32] finding customers for automobile sales,[33] developing commercial buildings and managing residential condominiums in those buildings,[34] dispensing various prepaid products, such as public transportation tickets, event and attraction tickets, gift certificates, prepaid phone cards, and promotional and advertising materials, through their ATM machines,[35] operating a "virtual mall" where bank customers "can shop for a range of financial and non-financial products and services,"[36] and providing "Web design and development services."[37] The OCC has also authorized national banks and their operating subsidiaries to engage in all forms of real estate lending. *See* 12 C.F.R. Pt. 34.[38]

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[30] OCC, *Activities Permissible for a National Bank, 2007*, at 5 (June 2008), *available at* http//:www.occ.treas.gov/corpapps/BankAct.pdf.

[31] *Id.* at 6.

[32] *Id.* at 16.

[33] *Id.*

[34] *Id.* at 67-68.

[35] *Id.* at 52.

[36] *Id.* at 56.

[37] *Id.*

[38] Of keen concern to NAR, of course, is, as Justice Stevens suggested in *Watters*, that "[t]he Comptroller may well have the authority to decide whether the activities of a mortgage broker, *a real estate broker*, or a travel agent should be characterized as 'incidental' to banking, and to approve a bank's entry into those businesses." 127 S. Ct. at 1583 (Stevens, J., dissenting) (emphasis added).

Numerous companies compete to provide all of these services, and the vast majority are *not* owned by national banks. Although state antidiscrimination laws apply to all of these competing companies, under § 7.4000 only the OCC can enforce those state laws against companies owned by national banks. Such freedom from state enforcement is likely to mean, as a practical matter, that national banks and their operating subsidiaries will be free from *any* effective enforcement of those laws, given significant competing demands on the OCC's attention, resources, and, indeed, enforcement skills with respect to such a wide range of activities governed by various States' laws. Therefore, companies owned by national banks are placed at a significant advantage over companies owned by state banks — or owned by no bank at all — even though all of these companies are in direct competition with each other. The resulting incentives for state banks to become national banks — and for independent companies to be acquired by national banks — threaten both to impair the dual-banking system and to prejudice the interests of consumers and other parties that state laws are designed to protect.

II. CONGRESS DID NOT STRIP STATES OF THEIR SOVEREIGN RIGHT TO ENFORCE NON-PREEMPTED STATE LAWS AGAINST NATIONAL BANKS AND THEIR OPERATING SUBSIDIARIES, NOR DID IT GRANT THE OCC THE AUTHORITY TO DO SO

A. Absent An Express Authorization From Congress, Administrative Agencies Cannot Strip States Of Their Sovereign Rights

This Court's cases make clear that, when Congress seeks to alter the federal-state balance of power,

Congress must "make its intention . . . unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (internal quotation marks omitted); *see United States v. Bass*, 404 U.S. 336, 349 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").

This clear-statement requirement is especially pronounced when a federal agency — and not Congress — is altering the basic allocation of authority between the federal and state governments. As this Court has explained, "where [an] administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power," the Court's "concern" for a clear statement from Congress "is heightened." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

That heightened concern applies here, where the OCC promulgated a regulation that purports to divest States of their sovereign authority to enforce generally applicable state laws against national banks and their operating subsidiaries. The OCC concedes, as it must, that national banks and their operating subsidiaries are subject to those state laws.[39] The laws in question are not preempted and, in particular, do not conflict with any federal law or policy.[40] Instead, the OCC claims that it alone —

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[39] *See* OCC C.A. Br. 37 (May 30, 2006).

[40] Accordingly, this case is very different from *Watters*, where the Court found that "the State's regulations [at issue] must give way" because those "state prescriptions significantly impair[ed] the exercise of [a national bank's] authority" under the National Bank Act. 127 S. Ct. at 1567. Therefore, neither

and not state attorneys general — can enforce against national banks and their operating subsidiaries those generally applicable laws that state legislatures retain authority to enact and that national banks and their subsidiaries must obey.

Allowing a federal agency to alter the federal-state balance without express authorization from Congress also blurs lines of political accountability, in contravention of this Court's other federalism precedents. *See, e.g., United States v. Lopez*, 514 U.S. 549, 576-77 (1995) ("[C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.") (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 169 (1992) ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

B. The Clear-Statement Rule Applies With Additional Force, In Light Of The OCC's Unprecedented Effort To Divorce State Legislative Power From State Enforcement Authority

A State's authority to enforce its own laws is an inherent sovereign power and a quintessential function of the State. As this Court held long ago: "To demonstrate the binding quality of a statute, but deny the power of enforcement[,] involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law." *First Nat'l Bank in St. Louis v.*

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the OCC nor the State could enforce the regulations at issue in *Watters* against the national bank's operating subsidiary.

Missouri, 263 U.S. 640, 660 (1924) (superseded by statute on other grounds); *see* Cuomo Br. 30-31.

Indeed, this Court has long held that States have the sovereign authority "to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 U.S. 313, 320 (1978); *see Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("[T]he power to create and enforce a legal code, both civil and criminal[,] is one of the quintessential functions of a State.") (internal quotation marks omitted). These two powers — the power to create law and the power to enforce that law — are interdependent, for "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Therefore, because "the sanction behind [state law] is that of the state and not that of the national government, the power of enforcement must rest with the former and not with the latter." *St. Louis*, 263 U.S. at 660. Notably, neither the OCC nor the court below identified any other instance in which Congress has allowed States to pass laws that they may not enforce.

Even assuming Congress has authority to preempt state enforcement of state laws, rather than state laws themselves, it follows that Congress must speak expressly to alter the federal-state balance of power in so unusual a way. Congress cannot do so through implication, and federal agencies should not be assumed to have received implicit delegations of power to strip States of their enforcement authority.

Accordingly, there is no basis in these circumstances for granting *Chevron* deference to the OCC's claim that the National Bank Act grants it such power. A fundamental prerequisite for the application of *Chevron* deference — the implicit delegation

of authority to agencies to fill in statutory gaps — is absent in this context. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); *id.* at 133 (recognizing that the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such . . . political magnitude to an administrative agency"); *cf. Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

C. Congress Did Not Expressly Divest States Of Authority To Enforce Non-Preempted State Law, Nor Did It Expressly Delegate To The OCC The Power To Do So

Although the court below appears to acknowledge that the clear-statement rule applies when Congress seeks to alter "an intrinsic aspect of state sovereignty," Pet. App. 11a, it never identified any such statement from Congress, and there is none. The OCC has pointed to two statutory provisions that it claims provide it the power to strip States of authority to enforce the laws that they retain the authority to enact. Neither contains the type of express statement that would be necessary to withdraw from States the "power of enforcement" that is "essentially inherent" in their authority to enact laws that apply to national banks and their operating subsidiaries. *St. Louis*, 263 U.S. at 660.[41]

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[41] The OCC also makes reference to its general rulemaking authority as the source of its power to restrict States from

The OCC (as did the court below) first relies on National Bank Act provisions granting the Comptroller "visitorial powers" over national banks. 12 U.S.C. §§ 481, 484(a); *see* Pet. App. 10a-32a. The term "visitorial powers" cannot be stretched to provide the necessary express statement of congressional intent to negate States' enforcement powers of their non-preempted laws. "Few ideas were more familiar in the formative era of the common law than that of visitation." Roscoe Pound, *Visitatorial Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369, 369 (1936). When Congress enacted the National Bank Act in 1864 and included the clause on "visitorial powers," *see* Act of June 3, 1864, ch. 106, § 54, 13 Stat. 99, 116, it incorporated the common-law meaning of that term.[42]

As this Court has held, under the common law, "visitorial powers" means that "the United States alone may inquire . . . whether a national bank is

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enforcing non-preempted state law. *See* 12 U.S.C. § 93a ("the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office"). General rulemaking authority may mean that an agency receives *Chevron* deference for regulations that fall within its rulemaking authority, but it does not mean that Congress implicitly delegated to the agency the authority to pass any rule on any subject it wishes. Congress has not expressly authorized the OCC to strip States of enforcement authority over valid state laws, and therefore the mere fact that the OCC has rulemaking authority does not mean that it has authority to promulgate a rule doing so.

[42] *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal quotation marks and ellipses omitted).

acting in excess of its charter powers, and . . . the state is wholly without authority to do so." *St. Louis*, 263 U.S. at 660; *see also Watters*, 127 S. Ct. at 1568-69. Numerous federal courts have confirmed that the OCC's "visitorial powers" do not preclude the authority of state officials to enforce non-preempted state laws against national banks.[43]

Accordingly, when a State brings an enforcement action against a national bank for violations of valid, generally applicable, and non-preempted state anti-discrimination or consumer protection laws, it is not exercising "visitorial powers" over that bank. This Court, in unmistakably clear terms, has explained that, when a State brings such an enforcement action, it is not "endeavoring to call the bank to account for an act in excess of its charter powers"; instead, it is seeking "to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating that law, not whether it is complying with the charter or law of its creation." *St. Louis*, 263 U.S. at 660.[44] Congress's use of the

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[43] *E.g.*, *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71, 74-75 (5th Cir. 1965) (upholding a state banking superintendent's authority to bring suit for injunctive relief); *Nuesse v. Camp*, 385 F.2d 694, 699-705 (D.C. Cir. 1967) (same); *Fleet Mortgage*, 158 F. Supp. 2d at 966 ("[f]ederal law does not require that the OCC have exclusive enforcement" of state laws prohibiting fraud and deceptive trade practices against "national banks and their branches").

[44] The General Accounting Office (now the Government Accountability Office) ("GAO") similarly recognized the distinction between a "law enforcement" agency "focused on conducting investigations in response to consumer complaints and other information" and a "supervisory" officer like the Comptroller performing "routine monitoring and examination responsibilities." GAO, *Consumer Protection: Federal and State Agencies*

phrase "visitorial powers," therefore, cannot be interpreted to reflect an intent to divest States of their inherent, sovereign authority to enforce the laws they have the power to enact against those parties that are subject to — and violate — those laws. *See* Cuomo Br. 19-32.

The OCC also relies on 12 U.S.C. § 1818, which authorizes the OCC to initiate cease-and-desist proceedings to remedy a violation of any "law, rule, or regulation." 12 U.S.C. § 1818(b). Section 1818(b) certainly is broad enough to grant the OCC concurrent authority to take enforcement actions when a national bank or an operating subsidiary violates an applicable state law. But § 1818(b) does not take the next step and grant the OCC *exclusive* authority to enforce those state laws, thereby precluding the progenitor of the law from enforcing it. That section does not mention state enforcement actions, nor does it contain any term that would qualify as the clear statement required to displace state executive authority. *See* Cuomo Br. 7-9.

In sum, no provision of the National Bank Act clearly authorizes the OCC's unprecedented encroachment on the authority of a State's executive to enforce the non-preempted laws that its legislature has authority to enact. *See* Cuomo Br. 43-47. The OCC therefore impermissibly promulgated § 7.4000 to insulate national banks and their operating subsidiaries — which may engage in numerous activities beyond the traditional business of banking — from state enforcement of generally applicable state laws, no different from the state banks and other companies with which they compete. Reversing the deci-

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Face Challenges in Combating Predatory Lending 53 (2004), *available at* http://www.gao.gov/new.items/d04280.pdf.

sion below would help to restore Congress's policy of competitive equality between the national and state banking systems.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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No. 08-453

IN THE
Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether this Court should defer to the determination of the Office of the Comptroller of the Currency in 12 C.F.R. § 7.4000 that state enforcement of nonpreempted state laws against national banks is preempted.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] Throughout this nation's history, the States have enacted and enforced laws designed to protect consumers from abusive and unfair practices by financial service providers. In particular, the States have taken a leading role in combating predatory and discriminatory lending practices. *Amici* also have a compelling interest in this Court's delineation of the constitutional limits on federal agency attempts to preempt state laws. They therefore submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

This case presents the question whether or to what extent courts should defer to federal administrative agencies when they determine that state or local laws should be preempted. The Office of the Comptroller of the Currency (OCC) has promulgated a regulation, 12 C.F.R. § 7.4000, which declares that it has exclusive visitorial authority with respect to the activities of national banks; that the only exceptions are visitorial functions authorized by federal law, vested in courts of justice, or exercised by Congress; and that the exception for visitorial authority exercised by courts of justice "does not grant state or other governmental authorities any right to . . . com-

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

pel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law." *Id.* § 7.4000(b)(2).

The effect of this regulation is to declare preempted any and all efforts by state authorities, including law enforcement officials, to bring actions to enforce state law that applies to national banks and is otherwise not preempted. The court of appeals, while finding little to commend the reasoning of the OCC (Pet. App. 25a-26a), nevertheless concluded that it was required to defer to the OCC's preemption determination under the principles of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, it enjoined the State Attorney General from bringing any enforcement action against national banks, even if federal regulators or private citizens would be allowed to invoke the same state legal authority in proceedings not initiated by state authorities.

This Court has been understandably cautious in issuing any broad pronouncements about the respective roles of courts and agencies in resolving preemption controversies. The issue is conceptually difficult, of great importance to the structure of American federalism, and presents itself in many variations, both in terms of the mechanics of different regulatory regimes and the inherently national or local nature of the underlying activity subject to regulation. Broadly speaking, three distinct questions must be answered: (1) Whether or under what circumstances action taken by a federal administrative agency can serve as the basis for a determination *by a court* that state law is preempted. (2) Whether or under what circumstances Congress may delegate

authority to a federal administrative agency to preempt state law *on the agency's own authority.* (3) Whether or under what circumstances a court faced with a question of preemption *should defer* to the judgment of a federal administrative agency that preemption is appropriate. Strictly speaking, only the third question is presented in this case, but the answer to each of the questions implicates the others.

The Court has answered the first question. Regulations and orders issued by federal administrative agencies—at least when they have the force of law—may serve as the basis of a determination by a court that state or local law is preempted. The Court has not addressed the second question, but Congress has, at least implicitly. Congress, in many different statutes, has expressly delegated authority to federal administrative agencies to preempt (or to exempt from preemption) provisions of state and local law. The Court has avoided any definitive pronouncement on the third question. The Court has never given *Chevron* deference to an agency determination that preemption is warranted, nor has it unequivocally applied the deference associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), to an agency opinion that preemption is or is not appropriate. The Court has, on several occasions, indicated that agency views may be entitled to "weight," at least on select variables bearing on a preemption decision where the agency has a comparative advantage relative to a court. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 883 (2000) ("some weight"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) ("substantial weight").

The key to unraveling the knot about how much deference courts should give to agency views on preemption lies in the answer to the second question, about whether Congress can delegate authority to agencies to make preemption determinations on their own authority. The text and history of the Supremacy Clause, the Necessary and Proper Clause, and considerations of comparative institutional advantage all point to the conclusion that agencies should be allowed to preempt state and local laws on their own authority only when they have been expressly delegated authority to preempt by Congress. A general grant of rulemaking authority that does not reference the power to preempt is not enough, nor is a general grant of authority to adjudicate disputes arising under federal law or to engage in oversight or investigation of private activity. Congress must specifically delegate the power to preempt.

This conclusion, and the recognition that the power to preempt is distinct from the power to interpret the meaning of federal law, answers the *Chevron* question. *Chevron* rests on the delegation of authority from Congress to an agency. An agency should be entitled to *Chevron* deference to resolve ambiguities about preemption only if Congress has expressly delegated authority to the agency to preempt. Absent such an express delegation, *Chevron* should not apply in considering an agency's determination that preemption is warranted.

Whether the *Skidmore* standard governs is a closer question. *Skidmore* allows courts to draw upon the experience of agencies in resolving questions of statutory interpretation, but it too does not focus the inquiry in precisely the right fashion. As recognized in *Medtronic* and *Geier*, and as confirmed by this

Court's recent decision in *Wyeth v. Levine*, No. 06-1249, slip op. (March 4, 2009), agencies can provide valuable input in preemption controversies, primarily by addressing questions of legislative fact about the impact of state regulation on federal regulators and the industry they are charged with regulating. It is therefore appropriate to give agency resolution of these kinds of factual issues "weight." Insofar as agencies seek merely to apply judicially-developed preemption doctrine, however, there is no basis for a court deferring "to an agency's conclusion that state law is pre-empted." *Wyeth*, slip op. at 20.

These principles yield clear conclusions as applied to this case. The OCC has not been expressly delegated authority to make preemption determinations on its own authority. Its views are therefore not entitled to *Chevron* deference. In justifying its preemption regulation, 12 C.F.R. § 7.4000, the OCC relied almost exclusively on its understanding of judicially-developed preemption doctrine. It made no relevant findings of legislative fact about the impact of state enforcement proceedings on national banks, or about the impact of such proceedings on its own visitorial functions. Its judgment is therefore entitled to no deference by this Court, which should decide the matter *de novo*.

ARGUMENT

I. THE ROLE OF AGENCIES IN PREEMPTION: CONSTITUTIONAL CONSIDERATIONS.

A. The Dual Nature of Preemption.

Preemption is often characterized as an exercise in statutory interpretation, or as resting entirely on congressional intent. *See, e.g., Medtronic*, 518 U.S.

at 485-86; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But as this Court recognized in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 744 (1996), a finding of preemption requires answering two interrelated questions. First, a question of substantive interpretation: What does the federal statute or regulation at issue mean? Second, a question about the impact of the federal law, as interpreted, on state law: can federal law coexist with state law, or does federal law require that state law be displaced?

Both agencies and courts are competent to interpret federal statutes. Agencies engage in statutory and regulatory interpretation all the time in the ordinary course of discharging their delegated functions. Indeed, this Court has repeatedly recognized that agencies in certain circumstances are preferred interpreters of statutes.

The question of preemption, however, presents additional factors not present in resolving relatively straightforward questions of interpretation. Sometimes, of course, Congress expressly determines by legislation that certain state laws are preempted by federal law. *See, e.g.*, 29 U.S.C. § 1144(a) (preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). But this Court has recognized that preemption can be implied rather than express. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (noting that "the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict"). Especially in this latter context, resolution of the preemption question requires a determination that federal law, as inter-

preted, is in tension with state law, and that this tension is sufficiently severe to require that state authority be displaced in whole or in part in order to achieve the purposes of federal law. This inquiry into the permissible degree of tension between federal and state law is not always—or even usually—resolved by determining the meaning of the federal text.

Given the unique, twofold nature of the preemption inquiry, it would be a mistake to import the jurisprudence associated with *Chevron* and *Skidmore* wholesale into the preemption context. Deference to agency interpretations about the meaning of specialized federal law may be entirely appropriate in circumstances where deference to agencies about the need to displace state law would not be. Consideration of the constitutional framework in which preemption occurs confirms that the agency role here must be carefully circumscribed.

B. The Implications of the Supremacy Clause.

This Court has repeatedly identified the Supremacy Clause as the source of federal authority to preempt state law. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152 (1982). The text and background of the Supremacy Clause shed important light on the question of what role agencies should play in preemption.

The Supremacy Clause identifies three sources of federal law as "the supreme law of the land" and hence as potential sources of preemption of state law:

the Constitution, treaties, and the laws of the United States which shall be made "in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 3. Federal agencies obviously have no authority to amend the Constitution, enter into treaties, or adopt supreme "laws" in the manner prescribed by the Constitution. Clearly, therefore, under the Supremacy Clause federal agencies have no inherent authority to declare state laws preempted.

This Court has recognized as much. In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), the Court rejected the FCC's contention that it could preempt a state regulation in order to "effectuate a federal policy" absent Congressional authorization. *Id.* at 385. Extensively reviewing its preemption case law, the Court said it was "both unwilling and unable" to "grant to the agency the power to override Congress" by permitting the agency "to confer power on itself." *Id.* at 374-75. Consistent with the Supremacy Clause, the only agency action that can serve as a source of preemption must be grounded in a delegation of authority from Congress.

The Supremacy Clause tells us more about the proper allocation of institutional authority in resolving preemption controversies. The full text of the Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. (emphasis added).

The clause singles out "the Judges in every State" as being bound to enforce supreme federal law, notwithstanding any contrary provision of state law. It is not entirely clear whether the phrase "the Judges in every State" refers to state court judges, or judges throughout the United States.[2] Whatever the scope of the intended class, it is comprised solely of judges. In other words, the Supremacy Clause specifically singles out the judiciary as an institution, and assigns it the task of resolving conflicts between supreme federal law and the laws of the States. This of course strongly suggests that the judiciary was understood to be the institution to make preemption determinations.

The inference about the preferred institution drawn from the text of the Supremacy Clause is powerfully reinforced by evidence of the original understanding of that Clause and its place in the constitutional order. As multiple commentators have documented, the Constitutional Convention had before it three potential mechanisms for resolving conflicts between state and federal law: (1) the use of coercive

[2] As is well known, the Framers left the decision whether to create lower federal courts to future Congresses. *See* 1 Max Farrand, The Records of the Federal Convention 104-05, 119, 124-25 (1911). This apparently accounts for the peculiar wording of the phrase, which would include both state court judges and, potentially, federal lower court judges. For the drafting history of the phrase, including the reason for the omission of any reference to this Court, *see* Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 255-56 (1985) (noting that the Supremacy Clause language was worked out before the Convention decided to create a national capital that was not part of any State where the Supreme Court would presumably sit).

force against defiant States, (2) James Madison's proposal that Congress be given an unrestricted power to "negative" any state law by federal legislation, or (3) the use of the courts to resolve competing claims grounded in different sources of law.[3] Each option corresponded to a different institutional choice. Force would be deployed by the Executive; the "negative" by the Legislature; judicial judgments by the courts. The Convention rejected the first two mechanisms in favor of the third. This important decision was embodied in the Supremacy Clause.

In short, of the institutions familiar to them, the Framers concluded that the courts were best situated to mediate between the claims of the national government and the States. Modern administrative agencies were unknown, and it is impossible to say what the Framers would have thought of relying on federal agencies to make these decisions. We do know that they were willing to trust the courts make these determinations. The Framers' decision to entrust the resolution of federal-state conflicts to the courts has been honored throughout our history. From *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), to the present, the judiciary has been the institution which has made individualized determinations of when state law must give way to superior federal

[3] *See* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 171-72 (1996); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1348-72 (2001); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 Conn. L. Rev. 829, 856-75 (1992); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 709-13 (1998).

law. This choice is fully reflected in the language of the Supremacy Clause, with its specific admonition to "the Judges in every State," and is entitled to the greatest respect.

C. The Necessary and Proper Clause.

The Necessary and Proper Clause, art. I, § 8, cl. 18, also bears on the analysis of institutional roles. The Necessary and Proper Clause is the source of Congress's power to enact express preemption clauses. Acting through its enumerated powers and the Necessary and Proper Clause, Congress can also adopt supreme "Laws" that delegate authority to federal agencies to act with the force of law. Agency action having the force of law, this Court has repeated ruled, can qualify as a source of a determination *by a court* that state law is preempted. The Court has so recognized both in the context of legislative agency rules and regulations, *see, e.g.*, *Geier*, 529 U.S. at 867-68; *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 674-75 (1993); *De la Cuesta*, 458 U.S. at 170; and in the context of binding agency adjudications, *see, e.g.*, *Entergy Louisiana., Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 49-50 (2003); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369-70 (1988).

If Congress can expressly preempt, and if it has the power to delegate authority to agencies to act with the force of law, then it would seem to follow that Congress can delegate authority to agencies to preempt state law on their own authority. Certainly, Congress has assumed that it has this power. Congress has enacted a number of statutes expressly authorizing agencies either to preempt state law or to

exempt state law from preemption.[4] The default position under the Supremacy Clause is that the judiciary decides preemption questions. But if Congress concludes in any particular context that an agency should be empowered to make case-by-case preemption determinations, Congress should be allowed to override the default by expressly delegating the power to preempt to an agency.

The critical question is how explicit such a delegation of authority from Congress must be in order to permit agencies to preempt (or save from preemption) on their own authority. As we have seen, agencies have no inherent power to preempt. As we have

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[4] *See, e.g.*, 10 U.S.C. § 1103 (authorizing Secretary of Defense to preempt state or local laws affecting department employee benefits when he determines that preemption is "necessary to implement or administer the provisions of a contract or to achieve any other important federal interest"); 30 U.S.C. § 1254(g) (authorizing Secretary of Interior to identify state laws and regulations preempted by the Surface Mining Control and Reclamation Act); 47 U.S.C. § 253(d) (authorizing Federal Communications Commission to preempt the enforcement of state and local statutes, regulations, or legal requirements interfering with development of competitive telecommunications services); 49 U.S.C. § 5125(d) (authorizing Secretary of Transportation to determine whether particular state, local or tribal requirements respecting the transportation of hazardous materials are preempted); 49 U.S.C. § 31141 (authorizing Secretary of Transportation to review and preempt state motor vehicle safety standards under specified criteria); *cf.* 21 U.S.C. § 360k(b) (authorizing Secretary of Health and Human Services, by regulation, to exempt from preemption certain state standards for medical devices otherwise expressly preempted by statute); 47 U.S.C. § 332(3)(A) (authorizing the FCC to exempt individual States from a provision generally prohibiting States from regulating entry or rates ch ged by mobile telephone carriers).

also seen, the text and history of the Supremacy Clause, as well as unbroken historical practice, have assigned the preemption determination to courts. Given this constitutional background, it is appropriate to require a very explicit delegation of preemption authority from Congress before an agency is allowed to preempt state law on its own authority. A general grant of authority to make "rules and regulations", or even a specific grant of power to define specific terms or implement a statutory provision will not do. Nothing less than a clear statement that preemptive authority is being conferred upon the agency, set forth in the text of the statute itself, should suffice.

II. CONSIDERATIONS OF COMPARATIVE INSTITUTIONAL ADVANTAGE REINFORCE THE CONCLUSION THAT THE JUDICIARY IS THE PROPER INSTITUTION FOR RESOLVING PREEMPTION CONTROVERSIES.

When we move beyond considerations of constitutional text and history to take into account broader considerations of comparative institutional advantage, we also find that the judiciary is the preferred institution for resolving preemption disputes.

A. Preemption Entails the Application of Law Developed by Courts.

Given its origins in the Supremacy Clause, it is not surprising that the legal doctrine governing preemption has been developed exclusively by courts, and in particular by this Court. This carefully evolved doctrine is trans-substantive, in the sense that it applies across all fields of regulation. Administrative agencies have played no role in the devel-

opment of preemption doctrine. When agencies have offered their views about the desirability or need for preemption, they have typically framed their analysis in terms of the categories and precedents developed by the courts.[5] In other words, agencies have justified their support (or opposition) to preemption largely in terms of their reading of judicial opinions, a source of authority that agencies have no special insight in interpreting, and which the judiciary is presumably in a better position to explicate. *See Negusie v. Holder*, No. 07-499, slip op. at 10 (March 3, 2009) (holding agency not entitled to deference for a policy based on an erroneous interpretation of judicial precedent). The OCC's performance in justifying its preemptive regulation at issue in this case is consistent with this pattern. *See* Pet. App. 25a.

In addition, the decision to preempt state law presents a variety of concerns that point toward the need for a general jurisprudence of preemption which can be developed and applied in a uniform fashion. For example, this Court has recognized a presumption against preemption in areas governed by the traditional police powers of the States. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Ideally, determining when this presumption does and does not apply should be developed in a consistent fashion across all areas of law—something that requires oversight by a single institution. Similarly, preemption doctrine requires the resolution of questions about the relationship between express and implied preemption, as well as the interpretation of certain recurring terms in express preemption

[5] *See* Nina A. Mendelson, Chevron *and Preemption*, 102 Mich. L. Rev. 737, 784-86 (2004).

clauses such as "requirements," or "relating to." *See, e.g., Bates v. Dow Agrosciencs L.L.C.*, 544 U.S. 431, 443 (2005) (interpreting "requirements" in one preemption clause in light of interpretation of same word in a different preemption clause); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (interpreting "relating to" in one preemption clause to conform to interpretation of same phrase under a different preemption clause). Only the courts, and in particular this Court—which has the ability to review questions of preemption that arise both from federal and state courts—can serve the function of resolving preemption questions in a manner that maintains a unified jurisprudence of preemption sensitive to the many systemic values at stake.

B. Preemption Implicates Considerations of Federalism.

The decision to displace state law through preemption also implicates important questions of federalism. *See, e.g., Medtronic*, 518 U.S. at 488 (describing preemption of state common law remedies as a "serious intrusion into state sovereignty"). Indeed, from the perspective of the States, there is little difference between a judgment that state law is preempted and a judgment that state law is unconstitutional. Both types of judgments nullify otherwise duly enacted state statutes and common law rules of decision. In so doing, both types of judgments subtract from the power the States otherwise enjoy as sovereign entities.[6]

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[6] To be sure, preemption decisions can be overridden by Congress. But mobilizing Congress to overrule preemption decisions is difficult, and has rarely been successful. *See* Note, *New Evidence on the Presumption Against Preemption: An Empiri-*

Part of our received tradition is the understanding that the judiciary has unique competence to resolve questions of constitutional federalism. Thus, for example, this Court has declined to adopt interpretations of statutes that raise serious questions of constitutional federalism, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), and has declined to defer to agency decisions that raise serious questions of constitutional federalism. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-73 (2000). Likewise, the decision to displace state law through preemption should be informed by an understanding of which areas of regulation have been delegated to the federal government, and which have been traditionally been committed to the States, and when constitutional sensitivities would be irritated either by a determination of concurrent authority or of exclusive federal competence.

Agencies are specialized institutions, intensely focused on the details of the particular statutory regimes they are charged with administering. By design and tradition, they are not expected to ponder larger structural issues such as the relative balance of authority between the federal and state governments, the importance of preserving state autonomy, the value of allowing policy to vary in accordance

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cal Study of Congressional Responses to Supreme Court Preemption Decisions, 120 Harv. L. Rev. 1604, 1613-14 (2007). Moreover, some constitutional judgments—those based on the dormant aspect of the Commerce Clause—are also subject to revision by Congress, further revealing the close connection between preemption and constitutional invalidation.

with local conditions, or the systemic advantages of permitting state experimentation with divergent approaches to social problems. *See Gregory*, 501 U.S. at 458-59 (summarizing the systemic benefits of federalism).

C. Preemption Implicates the Scope of Agency Power.

Determining whether federal law ousts state law also implicates the scope of agency authority. *See Louisiana Pub. Serv. Comm'n*, 476 U.S. at 374-75 ("An agency may not confer power upon itself."). There are a variety of reasons why agencies are not the best monitors of the scope of their own authority. Agencies may at times engage in empire-building, or may resent implicit competition from other sources of regulatory authority like States. Analysts have long observed that agencies, particularly ones devoted to regulation of a single industry, can become too closely identified with the interests of the industry they are supposed to regulate.[7]

Congress has provided for judicial review of agency action in significant part to assure that agencies stay within the bounds of their delegated authority. This Court has been reluctant to carve out any general exception from *Chevron* for agency interpretations that transgress the bounds of agency authori-

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[7] *See, e.g.*, Marver H. Bernstein, Regulating Business by Independent Commission (1955); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 Yale L.J. 467 (1952); *see generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum. L Rev. 1 (1998) (providing an overview of theories and empirical studies).

ty, presumably because of the difficulty of distinguishing between "jurisdictional" and "non-jurisdictional" decisions. *Compare Mississippi Power & Light*, 487 U.S. at 381 (Scalia, J., concurring in the judgment) *with id.* at 386-87 (Brennan, J., dissenting). There is no need in this case, however, to tackle this more general problem. Questions about whether state law should be preempted by federal law are not handicapped by any definitional conundrum similar to the one presented by determining when an agency has acted outside its "jurisdiction." The question whether federal law preempts state law is discrete and readily differentiated from other issues of interpretation. *See* Mendelson, *supra*, 102 Mich. L. Rev. at 796 ("Preemption questions are relatively easy to distinguish, *ex ante*, from other categories of interpretative questions, so withdrawing deference on preemption issues would not introduce significant new uncertainty-based costs."). Consequently, the decision to preempt can be subject to independent judicial review, allowing courts to police the boundaries of agency authority—along this dimension at least—without calling into question the general principle of deference established by *Chevron*.

D. Preemption Determinations May Require Findings of Legislative Fact.

On one dimension, that of legislative fact-finding, agencies may be superior to courts in resolving preemption controversies. Especially where implied preemption is involved, but also in cases in which there is a dispute about the scope of an express preemption clause, it will often be important to ascertain certain facts. In particular, it will be important to understand the practical consequences of eliminating diverse sources of legal obligation. Will

this stultify experimentation with different regulatory approaches and deprive the public of adequate protection? Or is uniformity imperative in order to allow regulated entities to achieve economies of scale? These inquires require legislative fact-finding. And there is little doubt that agencies, given their ability to undertake wide-ranging investigations of industry structure and similar variables, have the capability of finding legislative facts that far surpasses courts.

The conclusion would seem to be that courts are generally superior to agencies in resolving preemption controversies, except with respect to finding legislative facts that bear on the resolution of the issue. This points toward the desirability of a standard of review that allows courts to exercise independent judgment in matters of preemption, while drawing assistance from agencies when they have undertaken to find legislative facts that shed light on the proper resolution of the matter.

III. DETERMINING THE PROPER STANDARD OF REVIEW FOR AGENCY DETERMINATIONS OF PREEMPTION.

A. *Chevron* Versus *Skidmore* Versus *De Novo*.

This Court has identified three standards of review for evaluating agency interpretations of statutes: the *Chevron* standard, the *Skidmore* standard, and *de novo* review. *See generally United States v. Mead Corp.*, 533 U.S. 218, 227-28; 234-35 (2001). *Chevron* and *Skidmore* rest on different rationales for affording deference to agency interpretations of ambiguous statutes.

"A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990); *see Chevron*, 467 U.S. at 843-44 (deference rests on either express or implied delegation of power to agency). This delegation, in turn, creates a presumption that Congress intended the agency, rather than the courts, to exercise primary interpretational authority under the statute. *See Smiley*, 517 U.S. at 740-41 (*Chevron* rests on the "presumption" that Congress meant for the agency to "possess whatever degree of discretion" statutory ambiguity allows); *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997) (*Chevron* deference "arises out of background assumptions of congressional intent"). *Chevron* deference, when it applies, requires that the court accept any agency interpretation that is consistent with the statute and is otherwise "permissible" or "reasonable." *Chevron*, 467 U.S. at 844 (reasonable agency interpretation is given "controlling weight").

Under *Skidmore*, in contrast, no particular delegation of power to the agency is required before it is entitled to deference. 323 U.S. at 137. Deference under *Skidmore* is grounded not in delegated power but rather on the desirability of drawing upon the "specialized experience and broader investigations and information" available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a national program. *Id.* at 140. When *Skidmore* applies, "[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it

power to persuade, if lacking power to control." *Id.* at 140. Or, as the Court put it in *Mead*, an agency opinion evaluated under *Skidmore* receives the degree of deference appropriate to "the merit of its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." 533 U.S. at 235.

De novo review generally applies when courts interpret laws that are designed to hold agency power in check, including provisions of the Constitution and of general statutes like the Administrative Procedure Act, 5 U.S.C. §§ 552 *et seq.* It also applies when courts address legal requirements as to which agencies have no claim to expertise, such as federal laws administered by the courts or by other agencies, or state law developed by state courts or agencies. *De novo* review, of course, gives no weight to the interpretational views of the agency.

B. The Limited Availability of *Chevron* in Preemption Cases.

Chevron is grounded in a delegation of authority from Congress to an agency to determine certain unresolved questions of federal law. This Court has accordingly recognized two preconditions that must be met before the *Chevron* standard applies. The two preconditions are that (1) Congress has delegated authority to the agency to act with the force of law; and (2) the agency has acted in accordance with this delegated authority in rendering its interpretation. *Gonzales*, 546 U.S. at 258-59; *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *Mead*, 533 U.S. at 226-27; *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The extension of these principles to agency determinations of preemption is straightforward. The power to preempt is distinct from the power to interpret, *see supra* Part IA, and agencies have no inherent power to preempt, it must be expressly delegated to them, *see supra* Part IC. Thus, for an agency to be eligible for *Chevron* deference for its determinations of preemption, it must show that (1) Congress has delegated authority to the agency to act with the force of law *to preempt state law*; and (2) the agency has acted in accordance with this delegated authority in determining that state law *should be preempted*. If Congress has not delegated authority to an agency to make binding determinations of preemption, or if an agency has been given such authority but does not invoke that authority in offering its judgment about the preemptive effect of federal law, then the preconditions for *Chevron* deference have not been met.

The Court's decision in *Gonzales v. Oregon* fully supports this analysis. The Court there concluded that a delegation authorizing the Attorney General to promulgate regulations relating to the registration of controlled substances did not authorize him to issue an interpretative regulation preempting a state law permitting physicians to prescribe lethal doses of medication to terminally-ill patients in certain circumstances. The Attorney General had been granted authority to make rules in certain respects, but as the Court independently construed the grant of authority, "he is not authorized to make a rule declaring illegitimate a medial standard for care and treatment of patients that is specifically authorized under state law." *Gonzales*, 546 U.S. at 258. The Court therefore declined to apply the *Chevron* stan-

dard to assess the validity of the Attorney General's preemptive regulation. *Id.* at 268-69.

Similarly, in *Adams Fruit*, 494 U.S. at 649-50, the Court declined to apply the *Chevron* standard in reviewing a Department of Labor determination of the preemptive effect of the Migrant and Seasonal Agricultural Worker Protection Act. As the Court subsequently characterized its holding, "a delegation of authority to promulgate motor vehicle '*standards*' [does] not include the authority to decide the preemptive scope of the federal statute because '[n]o such delegation regarding [the statute's] enforcement provisions is evident in the statute." *Gonzales*, 546 U.S. at 263 (quoting *Adams Fruit*, 494 U.S. at 649-50) (first interpolation added).

As previously discussed, Congress on many occasions has expressly delegated authority to agencies to preempt state law. *See supra* p. 12 & n.4. Agency determinations made under these statutes satisfy the conditions for application of the *Chevron* standard. Other agency determinations of preemption do not.

C. The *Medtronic* Standard.

If *Chevron* does not ordinarily apply to agency determinations of preemption, then is *Skidmore* the proper standard? There is something to be said for this approach. *Skidmore* instructs courts to give careful consideration to agency views, grounded in experience, about the meaning of statutes that they have developed relevant expertise in understanding. Yet *Skidmore* requires courts to follow these views only to the extent they are persuasive, thus preserving a large element of judicial authority. This strikes

a better balance in the pre-emption context than does *Chevron* deference.

Unfortunately, the *Skidmore* test does not focus on the variables in preemption where agency input would be most helpful. *Skidmore* is designed to aid the court in ascertaining the proper meaning of a statute, not to inquire into whether the statute should be given preemptive effect. *Skidmore* cites a list of factors that tend to make any official interpretation of a text more or less persuasive, such as the "thoroughness evident in its consideration," the "validity of its reasoning," whether it is consistent with earlier and later pronouncements on the subject, the expertise of the interpreter with respect to the subject in question, and so forth. *See Skidmore*, 323 U.S. at 139-40; *Mead*, 533 U.S. at 234-35. This does nothing to channel attention to those aspects of the preemption decision where the agency can provide the most help to the court, namely in making findings of legislative fact about the impact of diverse state standards on the functioning of the agency and on the industry the agency is charged with regulating.

A better formulation of the standard of review is the one implicitly applied in the Court's decisions that touch on this subject from *Medtronic* to the present, which we take the liberty of calling the "*Medtronic* standard." This allows the court to exercise independent judgment in determining the preemptive effect of a statute, while giving appropriate weight to the view of the relevant administrative agency on questions of legislative fact that bear on the preemption decision.

Thus, in *Medtronic*, the Court considered the effect of an express preemption clause in the Medical

Device Amendments to the Food, Drug, and Cosmetic Act. The Court independently interpreted the ambiguities in the statute bearing on the preemption decision. *See Medtronic*, 518 U.S. at 486-91. Only after extensive consideration of these issues did the Court turn to the Food and Drug Administration's views. The Court cited a number of factors that caused it to give those views weight, including the fact that the agency was uniquely qualified to assess whether a particular form of state law would stand as an obstacle to achieving the objectives of the federal statute. *Id.* at 496. But the Court did not apply either the *Chevron* or the *Skidmore* framework. Instead, it said only that its conclusion was "substantially informed" by the FDA's view about preemption. *Id.* at 495.

Similarly, in *Geier*, the Court held that preemption of state tort liability was required to avoid frustrating a regulation promulgated by the National Highway Traffic Safety Administration calling for a phase-in of passive restraint systems. The Court was careful, however, not to suggest that deference was required based either on the delegation of power to the agency or the agency's general expertise in matters of auto safety regulation. Instead, the Court concluded only that the agency's views about the impact of state tort law on its regulation were entitled to "some weight" in the circumstances of that controversy. 529 U.S. at 883. In particular, the Court noted that the agency was uniquely qualified "to comprehend the likely impact of state requirements." *Id.*

More recently, in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007), the Court reviewed a lower-court judgment that relied on *Chevron* in hold-

ing state authority over operating subsidiaries of national banks preempted. The majority found no need to reach the question whether *Chevron* or any other standard of deference was appropriate, since in the majority's view preemption was compelled by the National Bank Act itself. The dissenting opinion did consider what weight should be given to agency views about preemption. *See id.* at 1582-86 (Stevens, J., joined by Roberts, C.J. and Scalia, J.). The dissenters acknowledged that "expert agency opinions as to which state laws conflict with a federal statute may be entitled to 'some weight,' especially when 'the subject matter is technical' and 'the relevant history and background are complex and extensive.'" *Id.* at 1584 (quoting *Geier*, 529 U.S. at 883). But the dissenters expressly rejected *Chevron* deference, noting that this would too "easily disrupt the federal-state balance," that agencies are not well designed to represent the interests of States, and that agencies are unlikely to show sufficient respect for state sovereignty. *Id.* The majority did not take issue with this analysis, noting only that the question was "academic" given its conclusion that preemption was required by the statute itself. *Id.* at 1572.

The Court returned to the issue of agency views about preemption in *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008). As in *Watters*, the Court agreed with the agency that preemption was warranted, but as in *Watters*, the Court "found it unnecessary to rely upon that agency view" because "the statute itself speaks clearly to the point at issue." *Id.* at 1009. A dissenting opinion briefly discussed the agency's recently-adopted view favoring preemption. *See id.* at 1016 n.8 (Ginsburg, J. dissenting). The dissent noted that this view had been advanced only in an *amicus* brief and, as such, was entitled to "at most" the defe-

rence afforded under *Skidmore*. Because the agency had changed its position, the dissent thought that view was entitled to little weight. The majority responded that *if* the agency view were relevant, "mere *Skidmore* deference would seemingly be at issue." *Id.* at 1009. Like the dissent, the majority agreed that, in that hypothetical event, only "reduced" deference would be owed the agency given its change in position. *Id.*

Most recently, in *Wyeth v. Levine*, No. 06-1249, slip op. (March 4, 2009), the Court again addressed the role of agency determinations in preemption cases. The Court observed that the Food and Drug Administration, in that matter before it, had not acted with the force of law, but had merely asserted in the preamble to a regulation and in an *amicus* brief filed by the Solicitor General on behalf of the agency "that state law is an obstacle to achieving its statutory objectives." *Id.* at 19. Moreover, Congress had not "authorized the FDA to pre-empt state law directly." *Id.* Under these circumstances, the Court concluded, it was not proper to defer to "an agency's *conclusion* that state law is pre-empted." *Id.* at 20. The agency's views were entitled to "some weight," *id.* (quoting *Geier*, 529 U.S. at 883), given its understanding of the statute and its "ability to make informed determinations about how state requirements may pose an 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). But the weight given those views "depends on [the agency's] thoroughness, consistency, and persuasiveness." *Id.* In light of the procedural irregularities in the agency's development of its position, and the inconsistency with which that position had been maintained over time, the Court concluded

that the agency's views did not merit any deference. *Id.* at 20-21. This thorough consideration of the issue confirms that the Court has embraced the "*Medtronic* standard" for assessing agency determinations of preemption, at least in circumstances where Congress has not expressly delegated authority to the agency to preempt.

D. All Predicate Legal Determinations Must be Assessed under the Appropriate Standard.

A final and critical point is relevant here. When an agency seeks judicial deference for its determination that state law is preempted, *all* agency interpretations of federal law that serve as a predicate to the determination of preemption should be reviewed under the appropriate standard (which we believe should ordinarily be the *Medtronic* standard). As previously noted, preemption decisions entail two interrelated inquiries: first, the meaning of federal law; second, whether any tension between federal and state law requires the displacement of state law. If the agency seeks deference for its interpretation of federal law and no issue about displacement of state law is presented, then there is no reason why *Chevron* should not supply the relevant standard (provided the other preconditions for *Chevron* deference are met). *See Smiley*, 517 U.S. at 735. But if the agency asks the court to defer to its judgment that preemption is required, all steps in the chain of logic that lead to this conclusion should be reviewed under *Medtronic*. Any other approach would lead to ready evasion of the limits on agency authority to preempt.

In this case, for example, the OCC has justified its preemption regulation in part as an interpretation of the phrase "visitorial authority," and in part

as an interpretation of the phrase "courts of justice." Since these terms appear in a provision of the National Bank Act giving the OCC exclusive visitorial authority over national banks, *see* 12 U.S.C. § 484, either a broad interpretation of "visitorial authority" or a narrow interpretation of "courts of justice" (or both) leads to the conclusion that state enforcement of state law is preempted, because it is a type of visitorial authority given exclusively to the OCC. Consequently, affording *Chevron* deference to the OCC on the "meaning" of the critical terms will likely foreordain the outcome of the preemption inquiry. In order to preserve the proper allocation of institutional roles, all predicate legal determinations that lead to a finding of preemption must be reviewed independently under the *Medtronic* standard.

IV. THE OCC IS ENTITLED TO NO DEFERENCE FOR ITS PREEMPTION DETERMINATION.

Under the foregoing principles and the suggested standard of review, the OCC is entitled to no deference for its determination of preemption set forth in 12 C.F.R. § 7.4000.

A. The OCC Is Not Eligible for *Chevron* Deference.

There is nothing in the National Bank Act to suggest that Congress has delegated authority to the OCC to make binding determinations of preemption on its own authority. Congress has granted general rulemaking authority to the OCC in 12 U.S.C. § 93a, which gives the Comptroller authority "to prescribe rules and regulations to carry out the responsibilities of the office." This provision, which was adopted in 1980, *see* Pub. L. No. 96-221, Title VII § 708, 94 Stat.

188, does not unambiguously confer authority on the OCC to issue legislative regulations, the only type that can be said to have preemptive effect.[8] Arguably, congressional intent to authorize legislative rules under §93a may be inferred from a subsequent amendment, adopted in 1994, which authorizes the Comptroller, "act[ing] in the Comptroller's own name and through the Comptroller's own attorneys [to] enforce[e] any provisions of this title [or] *regulations thereunder*." 12 U.S.C. § 93(d) (emphasis supplied). *See* Pub. L. No. 103-325, § 331(b)(3). Express congressional authority "to enforce" regulations has often been regarded as a signal of intent of authorize an agency to make legislative rules.[9]

Even assuming §93a authorizes legislative rules, however, it nowhere expressly authorizes legislative rules that preempt state law. The power to declare state law preempted is not mentioned, either explicitly or by clear implication. If §93a suffices to delegate authority to agencies to make binding determinations of preemption, then every federal administrative agency with a general grant of authority to make rules and regulations would be empowered to make binding determinations of preemption.

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[8] *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979) (holding that 5 U.S.C. § 301, which confers authority on the heads of executive departments to prescribe regulations for the "government of his department," does not confer authority to make legislative rules); *Interstate Commerce Comm'n v. Cincinnati*, 167 U.S. 479, 494-95 (1897) (holding that agency cannot be given legislative rulemaking authority by implication, only by express grant).

[9] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 493-526 (2002).

Nor does 12 U.S.C. § 43, requiring that federal banking agencies follow specific procedures "[b]efore issuing any opinion letter or interpretative rule" dealing with preemption, constitute a grant of such authority. Section 43 nowhere confers any authority to make preemption decisions. It imposes a *limitation* on any preexisting agency authority with regard to preemption, requiring procedures beyond those set forth in the APA for issuing opinion letters or interpretative rules. *See* 5 U.S.C. § 553(b) (exempting interpretative rules and general statements of policy from notice and comment requirements). This is confirmed by the Conference Report, which states that the new procedures are "not intended to confer upon the agency any new authority to preempt or to determine preemptive Congressional intent, or to change the substantive theories of pre-emption, as set forth in existing law." H.R. Rep. No. 103-651, *as reprinted in* 1994 U.S.C.C.A.N. 2068, 2076.

If anything, §43 appears to underscore congressional understanding that any agency view about preemption would be advisory only. "Opinion letters" and "interpretative rules" are nonbinding forms of agency action, offering only advice to the regulated community about an agency's understanding of the law's requirements. *See, e.g.*, 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.4 (4th ed. 2002). They do not have the force of law, and hence are not eligible for *Chevron* deference. *See Mead*, 533 U.S. at 234; *Christensen*, 529 U.S. at 587. As previously noted, Congress occasionally delegates authority to agencies to make determinations of preemption that have the force of law. But when it does so, it conveys such authority in unmistakable language. Section 43 falls well short of such an unambiguous grant.

B. The OCC is Entitled to No Deference Under the *Medtronic* Standard.

Nor does the OCC's preemption determination merit any deference under the *Medtronic* standard. The OCC's explanation for its preemption rule (*see* 69 Fed. Reg. 1895, 1895-1900 (Jan. 13, 2004)) reads like a legal brief. It was characterized by the court of appeals as a "cursory analysis," "lacking any real intellectual rigor or depth." Pet. App. 26a. It offers no findings of legislative fact about the impact on national banks of allowing state enforcements agencies to enforce nonpreempted state law. Nor does it offer any analysis of the impact of continued state enforcement on its own visitorial functions. As the court of appeals observed, "the OCC does not appear to have found any facts at all in promulgating its visitorial powers regulations." Pet. App. 25a. The OCC has provided this Court with no reason for deferring to its preemption analysis that would not be equally applicable to the analysis of preemption by a federal district court or contained in a legal brief filed on behalf of the OCC.

Under these circumstances, the Court should exercise independent judgment in deciding the preemption question, without deferring in any respect to the views of the agency.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ANDREW M. CUOMO, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae North American Securities Administrators Association, Inc. (NASAA), respectfully submits this brief in support of Petitioner and urges the Court to reverse the decision of the court of appeals for two reasons. First, the decision below eliminates important consumer protections under state banking law at a time when the financial services industry obviously requires vastly more oversight and enforcement, not less. Second, the decision endows the Office of the Comptroller of the Currency (OCC) – and, by extension, other federal agencies – with far too much power to preempt state laws through mere rulemaking. As argued *infra*, this is not what the Framers of our Constitution or our elected representatives in Congress intended, nor does it serve the public interest.

NASAA is the nonprofit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. Formed in 1919, it is the oldest international organization devoted to protecting investors from fraud and abuse in the offer and sale of securities. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. These agencies are responsible for regulating

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters on file with the Court.

securities transactions under state law. Their fundamental mission is protecting consumers who purchase securities or investment advice, and their jurisdiction extends to a wide variety of issuers and intermediaries – many of them bank affiliates – who offer and sell securities to the public.

State securities regulators are counterparts to state banking regulators, and their core functions are essentially the same: licensing industry participants, examining firms, investigating violations of state law, filing enforcement actions when appropriate, and educating the public about fraud and abuse.[2]

NASAA offers training programs for attorneys and examiners, coordinates multi-state enforcement actions, publishes investor education materials, presents the views of its members in testimony before Congress, and, as *amicus curiae*, represents its membership's position in significant legal proceedings involving the regulation of financial services. NASAA and its members share with Petitioner the overarching goal of protecting consumers from financial fraud and abuse.

The decision of the court below strikes a heavy blow against consumer protection by enjoining Petitioner from even investigating evidence of racially discriminatory lending practices by several national

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[2] All of these activities under state law parallel and complement the regulation of securities under federal law by the Securities and Exchange Commission (SEC). This state/federal partnership strengthens investor protections while at the same time affording the securities industry and our capital markets ample room in which to operate.

banks and their operating subsidiaries. Worse, in upholding OCC's unprecedented preemptive rule, the court of appeals effectively insulates national banks and their affiliates from accountability under state law for a wide range of illegal banking practices. The states' hands are tied, consumers are victimized, and the guilty banks avoid detection and prosecution altogether.

Allowing OCC or any other federal agency to wield such power poses a serious threat to state regulation and consumer protection. Indeed, OCC's tenacious and successful effort to expand federal preemption via rulemaking raises the specter that the agency will seek to exercise this power in other areas, including securities, notwithstanding manifest congressional intent in the Gramm-Leach-Bliley Act[3] to preserve the states' regulatory and enforcement jurisdiction over financial subsidiaries that engage in securities transactions. *See* 15 U.S.C. § 6701(f). For example, an OCC advisory letter issued after GLBA was enacted observes that even where federal statutes "specifically give enforcement authority to state attorneys general, . . . issues may arise as to the appropriate role of a state official with respect to a national bank's activities." OCC Advisory Letter 2002-9 at 1, n.1 (Nov. 25, 2002), *available at,* http://www.occ.treas.gov/ftp/advisory/2002-9.doc.

State securities regulators, state banking regulators, and state attorneys general all play a vital role in protecting consumers from fraud and abuse,

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[3] Pub. L. No. 106-102, 113 Stat. 1338 (1999) [hereinafter "GLBA"].

and they do so without disrupting or impeding concurrent federal regulation of our financial services industry. To the extent state regulators are precluded from exercising their investigative and enforcement powers, the public suffers. NASAA, therefore, has an interest in supporting reversal of the decision below.

INTRODUCTION

This case arises as part of a sequence of cases in recent years in which OCC has, through unprecedented assertions of preemptive authority, usurped the sovereign power of the States and disrupted the federal-state balance that has been a hallmark of the dual banking system since 1863, when national banks were first created. Yet nothing in the National Bank Act authorizes OCC's encroachments into traditional areas of state authority.[4] Those incursions have been by regulatory fiat, in an industry which this Court has recognized is, both "as a matter of history and as a matter of present commercial reality, * * * of *profound local concern*." *Lewis v. BT*

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[4] On the contrary, from the creation of the national banking system, the prevailing characteristic of our dual banking system has been that of concurrent regulation. Indeed, the National Bank Act contains only one provision that can be read as expressly preempting state law, 12 U.S.C. § 85, several provisions that require OCC to defer to (and abide by) the policy choice made by state law, *e.g.*, 12 U.S.C. §§ 36, 92a, 214c, and an overall structure and tone contemplating the coexistence of the laws of the state and federal sovereigns, as OCC's own regulations have recognized. *See, e.g.*, 12 C.F.R. § 7.2000(b) (permitting national banks, where not inconsistent with federal banking laws and regulations, to choose corporate governance procedures from a menu of state corporate law options).

Inv. Managers, Inc., 447 U.S. 27, 38 (1980) (emphasis added).

Nevertheless, since the turn of the millennium, OCC has been remarkably successful with a national litigation strategy of intervening in the lower federal courts (either as a party or as *amicus curiae*) around the country and persuading them to accord *Chevron* deference[5] where none is due, to ignore nearly 150 years of history in our dual banking system, and to disregard this Court's traditional presumption against preemption. So successful was that campaign that OCC was able to persuade this Court to extend the agency's preemptive reach to state-chartered operating subsidiaries of national banks. *Watters v. Wachovia Bank*, 550 U.S. 1 (2007).

OCC has demonstrated a resolve to amass exclusive regulatory jurisdiction over banks and their affiliates to a degree never intended by Congress.

> In recent years, the OCC has embarked on an aggressive campaign to declare that state laws and enforcement efforts are preempted if they have any impact on a national bank's activities. The OCC has zealously pushed its preemption agenda into areas where the States have exercised enforcement and regulatory authority without controversy for years.

Review of the National Bank Preemption Rules: Hearings Before the Senate Committee on Banking,

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[5] *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Housing, and Urban Affairs, 108th Cong., 2d Sess. (Apr. 7, 2004) (opening statement of Sen. Paul S. Sarbanes).

Tragically, OCC's strategy has had catastrophic effects. Far from creating an orderly world in which well-supervised national banks and their affiliates, operating under a uniform system of laws and regulations which their federal regulators competently enforce, empower individuals and businesses and fuel the economy through prudent lending, we have chaos and economic meltdown. Unrestrained by any necessity to comply with reasonable state laws regulating mortgage lending and preventing predatory and other types of discriminatory lending, the large banks, abetted by OCC's preemption crusade, have reaped the whirlwind. Most of them would have failed if the federal government had not provided a massive, taxpayer-funded bailout.[6]

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[6] The laxity of federal regulation has been amply documented in the media during the current economic meltdown. The extent of regulatory short-sightedness can be illustrated by the fact that the foundering Citigroup would have been allowed to acquire the insolvent victor in the *Watters* case, Wachovia Bank, N.A., had not Wells Fargo intervened with a higher bid. That acquisition now threatens Wells Fargo's financial condition, as the California bank posted a $2.55 billion fourth quarter loss for 2008. *See* Eric Dash & Michael de la Merced, *Wachovia Acquisition Drags Down Wells Fargo*, N.Y. TIMES, Jan. 29, 2009, at B3. One can only imagine the resulting donnybrook had Citigroup consummated the Wachovia acquisition. Similar troubles now afflict Bank of America, which the regulators allowed to acquire two insolvent behemoths, Countrywide Financial and Merrill Lynch. *See, e.g.*, Gretchen Morgenson, *The End of Banking As We Know It*, N.Y. TIMES, Jan. 18, 2009, BU Section (Bank of America "fessed up that its deals now need taxpayer backing"; federal government invested an

Not content with aggrandizing its power through substantive preemption regulations, OCC seeks further to expand its reach by "enforcement preemption" through an overbroad, and revisionist, interpretation of the visitorial powers statute, 12 U.S.C. § 484. That statute provides, in pertinent part, "No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress . . . ."

Although national banks have always been subject to state law,[7] OCC has, by regulatory fiat, largely eviscerated the "courts of justice" exception – even as to state laws which, as in the instant case, the agency concedes are *not* substantively preempted. In 2004, OCC, as an integral part of its assault on state regulation via preemption, amended its regulations in order to "clarify" the application of the "courts of

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additional $20 billion (after the $25 billion last fall) and agreed to guarantee more than $100 billion of imperiled assets). One expert has opined that the financial system will need another $1 trillion in common equity, *on top of* the $700 billion in the Troubled Asset Relief Program last fall and President Obama's recent, and even larger, stimulus plan. *Id.*

[7] Well over a century of consistent case law supports this view. *See, e.g., Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 244-54 (1944); *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 656 (1924); *Guthrie v. Harkness*, 199 U.S. 148, 157 (1905); *McClellan v. Chipman*, 164 U.S. 347, 359 (1896); *Davis v. Elmira Sav. Bank*, 161 U.S. 275 (1896); *Nat'l Bank v. Commonwealth of Kentucky*, 76 U.S. (9 Wall.) 353, 361-62 (1869). *See also Atherton v. FDIC*, 519 U.S. 213, 222-23 (1997) (applying similar principles to federally chartered thrift institutions); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (*simile*).

justice" exception. Office of the Comptroller of the Currency, Bank Activities and Operations, 69 Fed. Reg. 1895 (2004). The amendment was intended less as a clarification than as a *nullification* of enforcement authority by state officials and provided (*ipse dixit*) that "[the courts of justice exception] does not permit a State to use the courts to inspect, examine, regulate, or compel action by a national bank. Instead, the exception simply permits private litigants to obtain discovery and other judicial relief in actions involving national banks." *Id.* at 1900 (codified at 12 C.F.R. § 7.4000(b)(2)). The court below affirmed the validity of this interpretation on a *Chevron* deference rationale. *Cuomo v. The Clearing House Ass'n,* 510 F.3d 105 (2d Cir. 2007). The dissenting judge challenged this conclusion and observed that while national banks are federal instrumentalities, "they are also privately owned businesses headquartered in a particular state and, in general, subject to the laws of that state." *Id.* at 128 (Cardamone, J., concurring in part and dissenting in part) (citing *Commonwealth of Kentucky, supra*; *Guthrie v. Harkness, supra*; Keith R. Fisher, *Toward a Basal Tenth Amendment: A Riposte to National Bank Preemption of State Consumer Protection Laws,* 29 HARV. J. L. & PUB. POL'Y 981, 1002-1003 (2006)).

Apart from the statutory construction and *Chevron* issues that call the decision below into question, the majority's decision validated a regulation that impermissibly intrudes into the sovereign powers of a State in violation of established principles of

federalism and the Tenth Amendment to the Constitution.[8] This brief will focus on those issues.

SUMMARY OF ARGUMENT

Adopted by the Framers as a bulwark against federal encroachment upon state sovereignty and individual rights, the Tenth Amendment requires that whatever governmental authority is neither delegated by the Constitution to the federal government "nor prohibited by it to the States" must be "reserved to the States respectively, or to the People." U.S. CONST. amend. X.

The presumption against preemption articulated by this Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), and its progeny admonishes courts against finding that historic state powers have been superseded "unless that was the clear and manifest purpose of Congress." Under proper application of the Tenth Amendment, this presumption against preemption of state laws warrants heightened emphasis in cases of purported preemption by a federal agency. Such administrative preemption takes place outside the political process safeguards of federalism, which this Court identified in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1987), as the primary source of the states' Tenth Amendment protection. Fundamental to those political process safeguards is political accountability to the electorate, which is present when Congress and

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[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

the President together enact laws but absent when agencies make law by rulemaking. Especially in light of this Court's insistence that Congress provide a "clear statement" to overcome the presumption against preemption, *Gregory v. Ashcroft*, 501 U.S. 452, 460-464 (1991), the political process safeguards that give meaning to the Tenth Amendment demand unmistakably clear evidence of congressional authorization before agency preemption can be upheld. No such evidence exists in the case of 12 C.F.R. § 7.4000, the OCC regulation at issue here. Indeed, far from expressly or even impliedly conferring preemptive authority upon OCC, Congress has repeatedly indicated its desire that state regulation of the sort implicated here remain undisturbed.

Garcia's political process safeguards inform the interpretation of the Supremacy Clause, U.S. CONST. art. VI, cl. 2, pursuant to which only three categories of federal law constitute the "Supreme Law of the Land." Agency rulemaking is not among them. Not designed to represent the interests of the states *qua* states, and unfettered by the requirements of bicameralism and presentment that this Court has insisted be observed for statutes to qualify as "Laws of the United States" within the meaning of the Supremacy Clause, federal agencies may not enjoy preemptive authority for their regulations except in two circumstances: (i) Congress, in compliance with the requirements of Article I, Section 7, has expressly delegated preemptive authority to the agency, or (ii) in compliance with these same requirements, Congress has enacted an expressly or impliedly preemptive statute that the agency is merely interpreting, not, as here, rewriting. As the OCC regulation at issue does

not meet these requirements, it does not preempt state law.

ARGUMENT

I. 12 C.F.R. § 7.4000 IS SUBJECT TO THE PRESUMPTION AGAINST PREEMPTION, WHICH REQUIRES UNMISTAKABLY CLEAR EVIDENCE THAT CONGRESS HAS GIVEN THE AGENCY POWER TO PREEMPT.

The durability of our constitutional system owes much to the ingenious and innovative federalism of the Framers' constitutional design – "the unique contribution of the Framers to political science and political theory." *United States v. Lopez,* 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Forward,* 86 Yale L.J. 1019 (1977)). Meticulously providing for the creation and maintenance of multiple centers of concurrent power as an indispensable constitutional object, their design guarantees citizens "two political capacities, one state and one federal, each protected from incursion by the other"–"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Printz v. United States,* 521 U.S. 898, 920 (1997) (citing *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). In short, our federalism is about empowerment: a system that contemplates and invigorates alternative (and, at times, concurrent) governmental actors that can, on behalf of the people, solve important social problems.

Federal intervention into the domain of commercial activities traditionally regulated by the states calls into question one of the "oldest questions of Constitutional law," *New York v. United States*, 505 U.S. 144, 149 (1992) – namely, the appropriate spheres of sovereign authority of the federal and state governments and the proper relationship between them in our constitutional system. The Tenth Amendment is a key element in that design.

This Court has emphasized that the power not only to pass laws but to *enforce* them is an essential attribute of sovereignty. *See, e.g., Calderon v. Thompson,* 523 U.S. 538, 556 (1998); *Diamond v. Charles,* 476 U.S. 54, 65 (1986). By seeking to foist "enforcement preemption" on the states and prevent state officials from enforcing their own laws, 12 C.F.R. § 7.4000 not only usurps state sovereign power but engenders confusion among the citizenry as to who is responsible for lackadaisical or non-existent enforcement. Under such a regime, state officials will be held politically accountable for ineffective regulation not of their own making when, forced by federal regulators into inaction, they are prevented from "regulat[ing] in accordance with the views of the local electorate in matters not preempted by federal regulation." *New York v. United States,* 505 U.S. 144, 169 (1992).

The court below avoided the task of identifying and balancing the interests of federal and state sovereigns. In fact, neither the court of appeals nor OCC has made any pretense of identifying conflicting provisions of state law that would justify preemption. Instead, they have cut a broad swath through traditional areas of state sovereignty by ruling out the power of state

officials to enforce their own, non-preempted laws against national banks and their affiliates. So menacing an encroachment on state autonomy and self-governance directly implicates the core concerns of the Tenth Amendment. Those concerns are heightened where, as here, the political safeguards of federalism identified as essential by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1987) have been circumvented because preemption has been effected without congressional authorization.

This last point cannot be overemphasized. The underlying doctrinal premise of *Garcia* and its vision of the Tenth Amendment is the implicit protection of state interests via their political representation in Congress. *Garcia*, 469 U.S. at 551-52. Such a process-oriented doctrine of constitutional law has no applicability, however, to the dealings of state legislatures and state agencies with federal agencies, where there is no possibility of protection through political representation.

The political process aspect of the Tenth Amendment analysis is highlighted, moreover, by the peculiar position of federal administrative agencies within our constitutional form of government. Unlike Congress, federal agencies do not in any sense represent the states. Agency heads, such as the Comptroller of the Currency, are selected by the President, and agency staff are, by design, supposed to be disconnected from the political arena and serve as sources of technical expertise. *See generally* LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE (1981). As a federal administrative agency, OCC is not accountable to the

electorate and is subject to institutional pressures that tend to make it more likely that state interests will be overlooked or undervalued. For example, OCC largely subsists on fees paid by the institutions it regulates. The ability to generate agency revenues by collecting these fees creates incentives for OCC to encourage more and more banking organizations to opt for the national charter. Those financial incentives make the agency's decision-making process susceptible to error in ways that are not implicated when the decision-maker is an elected, representative body.

Precisely in order to prevent such results, this Court has long recognized a presumption against preemption in traditional areas of State regulation. "[W]e start with the assumption that the historic police powers of the states were not to be superseded * * * unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *Accord, Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 668 (1993).

The concerns animating and supporting the presumption against preemption are elevated when the preemption is effected not by Congress but by an administrative agency. In such situations, and especially where the agency acts by regulatory fiat, it operates without the political accountability that is vital to this Court's application of the Tenth Amendment. For example, the Court has held that Congress cannot "commandeer the legislative processes of the States by compelling them to enact

and enforce a regulatory program." *New York*, 505 U.S. at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)). If Congress were permitted to commandeer sovereign state resources to accomplish federal goals, "the accountability of both state and federal officials [would be] diminished." *New York*, 505 U.S. at 168. *See also Printz*, 521 U.S. at 920 ("The Constitution contemplates that a State's Government will represent and remain accountable to its own citizens." (citing *New York*, 505 U.S. at 168-169; *Lopez*, 514 U.S. at 576-577 (Kennedy, J., concurring)).

Enforcement preemption – ordering state officials *not* to investigate and enforce violations of concededly non-preempted state laws – constitutes a form of "negative commandeering" that suffers from the very same constitutional defects.

The utter absence of the political accountability component central to this Court's Tenth Amendment jurisprudence raises the bar considerably in agency preemption cases. OCC's regulation is the most disenfranchising type of exercise of purported federal preemptive authority, because it essentially eliminates state and local governmental problem-solvers from the playing field. Intrusions on traditional state authority will only be given effect when a statute's language makes the Court "absolutely certain that Congress intended" such a result. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."

Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-173 (2001).

Thus, in order to enhance the safeguards of federalism, this Court has recognized, as a gloss on the presumption against preemption, an additional canon of interpretation requiring a *clear statement* from Congress. *Id.* at 460-461. Such a statement would constitute unmistakably clear evidence indispensable to ensuring that courts do not displace state law in the name of a command Congress did not actually enact into law. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1986) (When "Congress intends to alter the balance between the States and the Federal Government, it must make its intention to do so *unmistakably clear* in the language of the statute") (emphasis added). *Accord, Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 541 (2002); *Gregory*, 501 U.S. at 460; *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989).

The court below conveniently side-stepped the presumption against preemption and the clear statement requirement by asserting that, in the context of banking regulation, the presumption "disappears" because of comprehensive federal legislation and regulation in that field. *Cuomo*, 510 F.3d at 113 (citing *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 151 (1982) and Second Circuit precedent relying thereon). That position should be rejected for two reasons.

First, bedrock principles of federalism, forged by the Founders and enshrined in the original Constitution and the Bill of Rights only after considerable reflection, debate, and compromise,

cannot be made to "disappear" so easily. "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 79 U.S. (7 Wall.) 700, 725 (1869).

Our Constitution is, in fact, "a compact between sovereigns." *New York v. United States*, 326 U.S. 572, 594 (1946) (Douglas, J., dissenting). A federal agency cannot relegate sovereign States to "a mere servile status," *id.* at 595, through selective application of fundamental precepts. Neither do presumptions created by this Court's constitutional jurisprudence – also products of reflection, debate, and compromise – vanish into thin air at the whim of transient lower court majorities.

Second, the Second Circuit's view of the National Bank Act is plain error and its reliance on *de la Cuesta* misplaced. Unlike the Office of Thrift Supervision (and its predecessor, the Federal Home Loan Bank Board), which have been held to enjoy field preemption under the entirely separate regime of regulating federal savings institutions under the Home Owners' Loan Act, OCC does not operate under similar authority and never has. As noted above, neither the language and structure of the National Bank Act (see note 4, *supra*) nor nearly a century and a half of case law interpreting it (see note 7, *supra*) provide any authority whatsoever for the Second Circuit's "disappearing act."

On the contrary, Congress has consistently sought to preserve the dual system of state and federal banking regulation. Among the many examples are Section 7 of the Bank Holding Company Act of 1956,[9] Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980,[10] and the revolutionary Riegel-Neal Interstate Banking and Branching Efficiency Act of 1994.[11] Indeed, the "disappearing act" approach of the majority opinion below is particularly anomalous given Congress' longstanding and oft-repeated expressions of support for the continued vitality of state banking regulation. In the IBBEA, for example, Congress adhered to its unwavering policy of maintaining the balance of Federal and State law under the dual banking system by ensuring that the application of state laws to national banks in the ordinary course of business is an essential element of that policy. It was effectuated by subjecting interstate branches of large, multi-state national banks – like much of the membership of Respondent Clearinghouse – to the laws of their host states in four comprehensive categories: intrastate

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[9] "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846.

[10] 12 U.S.C. § 1831d. After this Court's decision in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978), interpreting 12 U.S.C. § 85, gave national banks a competitive edge in the credit card business, Congress, within two years, enacted § 1831d to redress the balance and give to state-chartered banks everything that § 85 gave to national banks.

[11] Pub. L. No. 103-328, 108 Stat. 2338 (1994) ("IBBEA").

branching, community reinvestment, consumer protection (encompassing, *e.g.*, state anti-predatory lending laws), and fair lending (encompassing state anti-discrimination laws). 12 U.S.C. § 36(f).[12]

In cases of agency preemption then, the Tenth Amendment, in tandem with the presumption against preemption, demands *absolute* legislative clarity in order to ensure that Congress and the President, rather than politically unaccountable agency staff, make the crucial decision to preempt state law. Agencies cannot simply stand in Congress' stead when questions of federalism are at stake. They are not designed to represent the interests of the states, nor do they, and state interests are typically not part of the administrative calculus.

An instructive comparison can be made to the principles of comity and federalism animating this Court's *Burford* abstention doctrine. There federal courts decline to adjudicate matters that, though properly within their jurisdiction, would intrude unnecessarily into matters of importance to the states and disrupt the administration of complex state

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[12] The Conference Report expressly noted the States' "legitimate interest in protecting the rights of their consumers, businesses, and communities. . . . Congress does not intend that the [IBBEA] alter this balance and thereby weaken States' authority . . . ." H.R. Rep. No. 103-651, at 53 (Conf. Rep.) (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074. Tellingly, the Report also stated, "Under well-established judicial principles, national banks are subject to State law in many significant respects." *Id.*

regulatory schemes.[13] So too here, OCC and the federal courts ought to be wary of entering into this arena and disrupting the continuity of comprehensive programs of state regulation. That is especially true where there is every indication that state authorities are at least as well equipped as their federal counterparts to monitor compliance by national banks with state law and to do so without trammeling the OCC's visitorial powers and its independent authority to correct unsafe or unsound practices and bring enforcement actions for violations of law.

In sum, the Tenth Amendment elevates the presumption against preemption in cases involving preemption by agency regulation. In tandem with the "clear statement" rule, what is required is "unmistakably clear" evidence that Congress conferred preemptive authority. For the foregoing reasons, there is no such clarity here, nor can there be. Far from expressly conferring preemptive authority on OCC, Congress has repeatedly indicated its desire that the states continue to regulate in areas such as consumer protection, fair lending, and banking in general.

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[13] *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *See also New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989) (*Burford* abstention appropriate where case "presents difficult questions of law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or if its adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a mater of substantial public concern") (quoting *Colorado R. Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). *Accord, Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996).

II. UNDER *GARCIA'S* POLITICAL PROCESS SAFEGUARDS APPROACH TO THE TENTH AMENDMENT, 12 C.F.R. § 7.4000 CANNOT QUALIFY AS THE SUPREME LAW OF THE LAND.

Preemption through agency regulations such as 12 C.F.R. § 7.4000 undermines the political process safeguards of federalism in another important way. The Framers, through the Supremacy Clause, authorized state law to be displaced solely by three specific types of federal law: the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States." U.S. CONST. art. VI, cl. 2.

Although there are many instances in which an agency's regulations can be given preemptive effect, in all such cases either the agency is interpreting a statute in which Congress itself has exercised preemptive power, *e.g.*, *Smiley v. Citibank*, 517 U.S. 335 (1996), or else Congress has specifically delegated preemptive authority to the agency, *e.g.*, *New York v. FCC*, 486 U.S. 57 (1988). "[A]n agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Nor is the comprehensive nature of mere regulations adequate to confer preemptive effect. "To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state

balance embodied in our Supremacy Clause jurisprudence." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 717 (1985).

Thus, this Court's interpretation of the Supremacy Clause takes into account the same political process safeguards *Garcia* relied upon as the essence of what the Tenth Amendment protects. As noted above, that clause recognizes three categories of law as "the supreme Law of the Land." Elsewhere in the Constitution, the Framers prescribed in detail procedures that were "finely wrought and exhaustively considered," *INS v. Chadha*, 462 U.S. 919, 951 (1983), to govern the adoption of each type of law recognized in the Supremacy Clause. Article V and Article VII establish precise procedures for adopting and amending the Constitution; Article II, Section 2 prescribes the procedures for making Treaties; and Article I, Section 7 sets forth the detailed procedures for adopting "Laws."

The Framers deliberately made the adoption of each category difficult by requiring the assent of multiple participants, all of whom are subject to the political safeguards of federalism.[14] By making federal

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[14] This was particularly true of the Senate, which is the common denominator for all three categories recognized by the Supremacy Clause and which, at the time the Constitution was ratified, was composed of individuals with especially strong ties to the states, given that Senators were directly appointed by the states. Adoption of the Seventeenth Amendment may have attenuated those ties by providing for election of Senators by popular vote, but it has not otherwise diminished the difficulties inherent in making or amending what the Supremacy Clause recognizes as the "Supreme Law of the Land."

law more difficult to adopt, and by giving to those federal institutions designed to serve state interests, such as the Senate, effective veto power over all three forms of potential "Law of the Land," these procedures protect the residual authority of the states and constitute the core of *Garcia's* political process safeguards.

While the Supremacy Clause's most commonly understood function is to declare the preeminence of the enumerated sources of federal law over any state law "to the Contrary," it carries with it a negative corollary as well: State law remains unaffected in the absence of something qualifying as the Supreme Law of the Land. As OCC's visitorial powers regulation does not so qualify, it can effect no preemption. The political process protections of the Tenth Amendment demand nothing less.

Though superficially an unlikely ally for those opposing preemption, the Supremacy Clause contains very specific and illuminating language about what the Framers intended. When it comes to "Laws of the United States which shall be made in Pursuance [of the Constitution]," the only way these can be created is by strict compliance with the bicameralism and presentment requirements of Article I, Section 7. To remove ambiguity, and to prevent Congress from designating a potential "Law" as something other than a "Bill," the Framers included an additional clause which provides:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to

> the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, *according to the Rules and Limitations prescribed in the Case of a Bill.*

U.S. CONST. art. I, § 7, cl. 3 (emphasis added). That clause, and the specificity and comprehensiveness of the procedures contemplated thereby, would be meaningless if "Laws" capable of preempting state law could be made by other means or by other actors. Clause 3 therefore requires that Article I, Section 7 be regarded as prescribing the exclusive methodology for adopting "Laws of the United States."

This understanding of what is meant by the phrase "Laws of the United States" is structurally[15] confirmed

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[15] The historical evidence is also consistent with this understanding. Three mechanisms for resolving conflicts between federal and state law were introduced at the Constitutional Convention of 1787: (1) giving Congress power "to negative all Laws which they shd. Judge to be improper," James Madison, *Notes on the Constitutional Convention* (June 6, 1787) (quoting Charles Pinckney), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 164 (Max Farrand ed., 1911); (2) giving the Executive branch authority "to call forth the force of the Union [*i.e.*, use military force] agst. any member of the Union failing to fulfill its duty [to comply with federal law]," *id.* at 21 (Madison's notes of May 29, 1787); and (3) giving the judiciary power to treat acts of Congress as "the supreme law of the respective States," *id.* at 245 (Madison's notes of June 15, 1787). The latter became our Supremacy Clause. The decision to designate therein only the "Constitution, . . . Laws . . . made in Pursuance thereof, and . . . Treaties" as "the supreme Law of the Land" rendered them the

by consistent usage of the operative word, "Laws," throughout the text of the Constitution:

- Art. I, § 4, cl. 1 ("Congress may at any time by Law make or alter" regulations governing time, place, and manner for electing Senators and Representatives);

- Art. I, § 4, cl. 2 (Each year Congress shall assemble "on the first Monday in December, unless they shall by Law appoint a different Day");

- Art. I, § 6, cl. 1 ("Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law");

- Art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law");

- Art. II, § 2, cl. 2 (requiring Senate confirmation of "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law," except that "Congress may by Law" exclude the Senate from the appointment of "Inferior Officers");

- Art. II, § 3 (requiring the President to "take Care that the Laws be faithfully executed);

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sine qua non for trumping state law, thereby eliminating the manifest dangers that would attend allowing federal officials to make random judgments about the propriety of state law.

- Art. III, § 2, cl. 1 (providing that the judicial power of the United States extends to all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority");

- Art. III, § 2, cl. 3 (providing that when a federal crime is "not committed in any State, the Trial shall be at such Place or Places as the Congress may be Law have directed");

- Art. IV, § 1 (providing, in connection with the full faith and credit requirement for "public Acts, Records, and judicial Proceedings of every other State," that "Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof").

Each of these uses of the term "Law" (or its plural)[16] manifestly refers to legislative action taken in accordance with the procedures mandated by Article I, Section 7.

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[16] While the Constitution does also use the term occasionally to refer to common law (*e.g.*, "at Law or Equity" in Art. III, § 2, cl. 1) or to state law (*e.g.*, art. I, § 10, cl.1 prohibiting states from passing any "ex post facto Law, or Law impairing the Obligation of Contract"), taken in context these references do not call into question what is meant by usage of the term in connection with Laws to be passed by Congress and presented to the President. Obviously, the common law is not made "in Pursuance of" the Constitution, and to suggest that state Laws are treated by the Supremacy Clause as "the Supreme Law of the Land," would ignore the language of that Clause, which contrasts "Laws of any State" with "Laws of the United States . . . made in Pursuance [of the Constitution]."

Indeed, this Court has been assiduous in insisting that Congress comply fully with the procedures prescribed in Article I, Section 7. Congressional efforts to permit legislative branch agents to exercise the legislative power without regard to bicameralism and presentment, and legislation giving the President power to cancel portions of a statute post-enactment, have all been struck down in no uncertain terms. *See INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Clinton v. City of New York*, 524 U.S. 417 (1998).

The administrative lawmaking process is ill-suited to protecting the concerns of the Tenth Amendment and its procedural process safeguards. Unrestrained by the requirements of bicameralism and presentment, federal agencies can promulgate regulations and issue interpretations much more easily than Congress can enact statutes. Moreover, unlike Congress, agencies are not designed to (and, in fact, do not) represent the interests of the states *qua* states. The Framers' "finely wrought and exhaustively considered" lawmaking process, *Chadha*, 462 U.S. at 961, was designed, *inter alia*, to interpose a considerable impediment to federal encroachment on state prerogatives. If agency lawmaking by regulation could displace state law without express congressional authorization, a preemptive rule that could not command a legislative majority could nonetheless become federal law. Worse still, even if an overwhelming majority of both houses of Congress believed that such an agency preemptive rule would unduly trammel state authority, the onus would then be on *Congress* to overcome those same

structural impediments in order to overrule the agency legislatively.

With regard, then, to agency preemption, the political process safeguards of the Tenth Amendment demand strict compliance with the language of the Supremacy Clause before agency regulations can be given preemptive effect. In turn, the net effect of the language of the Supremacy Clause, read in context with the language and structure of the Constitution as a whole, is that no agency regulations can ever be "the Supreme Law of the Land" with preemptive effect *unless* Congress, in compliance with the requirements of Article I, Section 7, has expressly delegated preemptive authority to the agency or has enacted an expressly preemptive statute that the agency is interpreting. In the latter instance, the key concept is interpreting, not, as here, rewriting. OCC's purported "interpretation" of 12 U.S.C. § 484 is not an interpretation at all but a wholesale rewriting of the statute that vitiates the "courts of justice" exception that Congress enacted. Such agency action not only usurps the prerogative of the legislature, *see Dimension Fin. Corp. v. Board of Governors,* 474 U.S. 361 (1986), but is plainly incompatible with the requirements of Article I, Section 7. Accordingly, 12 C.F.R. § 7.4000 can have no preemptive effect and, to the extent it attempts to, should be invalidated.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ANDREW M. CUOMO,
ATTORNEY GENERAL OF NEW YORK,
Petitioner,

v.

THE CLEARING HOUSE ASSOCIATION, L.L.C., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATES OF NORTH CAROLINA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The States have a strong interest in preserving the system of dual sovereignty established by the Constitution. The position of the Office of the Comptroller of the Currency ("OCC") pushes the boundaries of preemption to new limits, thereby undermining the role that States play in our federal system. The OCC is seeking to displace the States from their historical enforcement role, and in so doing, to assume *sole* responsibility for enforcing state laws against national banks. Unlike the state attorneys general, the OCC has no experience in enforcing state public protection laws, has a minimal track record in consumer protection, and has no accountability to the citizens of any State.

Irresponsible lending practices by financial institutions contributed to the economic challenges our Nation faces today. The States are proud of their role in enacting legislation and bringing enforcement actions to deter misconduct on the part of the lending industry. The OCC's efforts to prevent the States and state attorneys general from pursuing these enforcement efforts directly impacts the States' ability to protect the public.

SUMMARY OF ARGUMENT

This case has ramifications far beyond the interpretation of an obscure provision in a 140-year-old federal banking statute. First and foremost, the case arises from a federal agency's attempt to interfere with a core principle of federalism – the authority of the States to enforce their own laws. The notion that a federal agency can usurp the authority of state attorneys general and claim the exclusive right to enforce a State's public protection laws seems incongruous on its face. Yet that is the position advocated by the Respondents in this case.

State legislatures have the sovereign power to enact laws for the protection of their citizens. State attorneys general have a duty to enforce those laws and are accountable to the citizens they represent. The OCC, as a federal regulatory agency, should not be permitted to override this essential function of the attorneys general by administrative fiat based on an unreasonable interpretation of a federal statute. To the extent that deference applies in this case, it should be afforded to the sovereign powers of the States, not to the turf protection policies of the OCC.

The Second Circuit's deference to the OCC pushed the *Chevron* doctrine beyond its intended and

reasonable limits.[1] This case involves substantial issues of interference with state sovereignty, which are appropriate for courts to decide, not regulatory agencies. Moreover, *Chevron* deference is not appropriate in this case given the OCC's self-interest in preempting state law.

The recent (and continuing) fallout from the subprime lending debacle demonstrates the need for more oversight and consumer protection enforcement in the area of mortgage lending. This case arose when the New York Attorney General attempted to investigate allegations of unfair and discriminatory subprime mortgage lending by banks operating in New York. However, instead of cooperating with New York's attorney general, the OCC pursued its adversarial policy toward the States by filing a lawsuit to enjoin the Attorney General's investigation.

The state attorneys general have a long track record of consumer protection enforcement. For many years, the attorneys general have conducted investigations, pursued litigation, and obtained settlements in consumer protection cases involving national banks, usually without jurisdictional controversy. Prohibiting the attorneys general from such consumer protection enforcement on the grounds

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[1] *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984).

that such actions constitute "visitorial powers" is erroneous as a matter of law as well as short-sighted public policy.

ARGUMENT

I. THE OCC'S PREEMPTION OF STATES' AUTHORITY TO ENFORCE THEIR OWN LAWS VIOLATES FUNDAMENTAL TENETS OF FEDERALISM.

A. The OCC Cannot Displace the Sovereign Power of the States to Enforce Their Own Non-Preempted Laws.

Respondents in this case are asserting a radical proposition – one that undermines the most basic principles of federalism. They contend that a State has no power to enforce a valid state law against a national bank, even if the bank clearly is bound by that law. According to Respondents, only the OCC, a federal regulatory agency, has the authority to enforce non-preempted state fair lending laws and to investigate potential violations of such laws. This attempt to preclude States from enforcing their non-preempted laws against federally chartered banks is a serious assault on our federal system.

It is a fundamental precept of federalism that "our citizens . . . have two political capacities, one state and one federal, each protected from incursion by the other." *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). As a result, the Federal Government and each State has "its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Id.* Accordingly, each State "has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 U.S. 313, 320 (1978). "[T]he power to create and enforce a legal code, both civil and criminal, is one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (citations omitted). Enforcement of state laws is an essential sovereign power of the States because "the power of a State to pass laws means little if the State cannot enforce them." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991).

As this Court has recognized, the Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. When the lines between state and federal responsibility are confused, "one of the Constitution's structural protections of liberty" is jeopardized. *Id.* at 921.

The OCC's claim of exclusive enforcement authority interferes with this fundamental principle of accountability. The OCC has no accountability to the citizens or elected officials of New York, let alone any interest or track record in enforcing state law. As Judge Cardamone aptly noted in his dissent from the Second Circuit's majority opinion in this case, "[b]y leaving state substantive law in place, while at the same time denying the state any role in enforcing that law, § 7.4000 [the OCC regulation at issue] erodes a key aspect of state sovereignty, confuses the paths of political accountability, and allows a federal regulatory agency to have a substantial role in shaping state public policy." *Clearing House Ass'n, L.L.C. v. Cuomo*, 510 F.3d 105, 130-31 (2d Cir. 2007) (Cardamone, J., dissenting).

In two cases that are mirror images of this one, the Court rejected the Federal Government's attempt to require States to implement and enforce federal regulatory programs.

In *Printz*, the Court struck down provisions of the federal Brady Act commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers. The Court held that forced participation of the States in the actual administration of a federal program violated the Constitution by intruding on the sovereign powers of the States. 521 U.S. at 918.

In *New York v. United States*, 505 U.S. 144 (1992), the Court held that the Tenth Amendment prohibited Congress from compelling the States to enact and enforce a federal regulatory program for radioactive waste disposal. This Court observed that state sovereignty and political accountability are impermissibly diminished "when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

Here, instead of commandeering the States to enforce a federal regulatory scheme, the OCC is attempting to prohibit the States from enforcing their own non-preempted laws against national banks. The OCC's action interferes with state sovereignty and the lines of accountability between the States and their own citizens no less than the federal overreaching struck down in *Printz* and *New York*.

It is a novel and extreme assertion of authority for a federal agency to claim, by its own regulation, that it has exclusive rights to enforce state law. The attorneys general, who frequently cooperate with federal authorities in investigating and prosecuting wrongdoers, are unaware of any federal agency other than the OCC that has taken the unusual step of suing a state attorney general to enjoin state enforcement of a non-preempted state law. Here, however, the OCC

chose to pursue an injunction against New York's Attorney General, rather than cooperating with his office to investigate the alleged violations of New York's anti-discrimination laws.

B. The States Have an Important Interest in Exercising Their Police Powers to Deter Abusive and Discriminatory Lending Practices.

The *amici* Attorneys General are not advocating their States' sovereign enforcement rights in this case merely because they have an academic interest in federalism. The problems of unfair mortgage lending underlying this case are matters of profound state and local concern.[2] The recent and ongoing foreclosure wave, caused in part by irresponsible subprime lending, negatively affects communities in a variety of ways, including the loss of home ownership, vacant and unmaintained housing, and a decline in property values and tax base. Predatory mortgage lending also

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[2] Predatory mortgage lending usually involves aggressive and deceptive solicitations made to unsophisticated lower-income borrowers, accompanied by abusive loan terms, such as escalating adjustable interest rates, excessive fees, and high prepayment penalties. *See generally* General Accounting Office ("GAO"), *Consumer Protection: Federal and State Agencies Face Challenges in Combating Predatory Lending*, pp. 18-19, 21-22 (2004) (hereinafter "GAO Predatory Lending Report").

has had a disproportionate effect on minority communities. *See, e.g.*, U.S. Department of the Treasury & U.S. Department of Housing and Urban Development, *Curbing Predatory Home Mortgage Lending: A Joint Report*, at 3-5, 13, 17-18, 22-23 (2000). In fact, reports of discriminatory pricing of loans made by banks to African-American and Hispanic borrowers in the New York metropolitan area precipitated the investigation by the New York Attorney General that the OCC seeks to prohibit in this case.

The States have been in the forefront of attacking predatory mortgage lending through legislative initiatives and enforcement. In 1999, North Carolina enacted the first comprehensive anti-predatory lending law in the country. *See* Act of July 22, 1999, ch. 332, 1999 N.C. Sess. Laws 1202, codified principally as N.C. GEN. STAT. §§ 24-1.1E and 24-10.2 (2009). The North Carolina legislation addressed "lending abuses that were not prohibited by federal statutes and regulations" and was supported by state officials, North Carolina's banks, and consumer groups. GAO Predatory Lending Report at 63. The legislation identified a category of "high cost" home loans and subjected those loans to significant consumer protections.[3] Since that time, at least 25

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[3] The legislation was then considered essentially preemption-proof because it did not directly limit interest

States have enacted similar legislation. GAO Predatory Lending Report at 59; Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1319-20, (2006); Baher Azmy, *Squaring the Predatory Lending Circle: A Case for States as Laboratories of Experimentation*, 57 FLA. L. REV. 295, 301, 361-72 (2005). In recent years, most States also have enacted or strengthened laws licensing and regulating mortgage brokers and other originators of home loans.[4] And, beginning in 2006, before any federal legislation was enacted, States moved to address the problem of loans made without regard to the borrower's ability to repay and without verification of the borrower's

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rates or fees on mortgage loans. As of 1999, it was generally understood that federal law preempted the States from limiting interest charged on loans made by out-of-state national banks. *See Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996). However, the OCC continued to move the preemption boundaries by taking increasingly aggressive preemption positions. In 2003, the OCC issued a preemption determination preempting the application of state predatory lending laws to national banks. Preemption Determination & Order, OCC Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003).

[4] The OCC's preemption of state supervisory authority over non-bank mortgage lending subsidiaries of national banks was upheld by this Court in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

income. *See, e.g.*, N.C. GEN. STAT. § 24-1.1F (2007); Act of April 20, 2007, ch. 18, 2007 Minn. Laws 84; OHIO REV. CODE ANN. § 1345.031(B) (2009).

The States also have a record of enforcement in the area of abusive mortgage lending. In 2000, the North Carolina Attorney General obtained $20 million in consumer refunds from the Associates, a major subprime lender acquired by CitiFinancial. Richard A. Oppel, Jr., *Citigroup to Pay Up to $20 Million in Deceptive Lending Case*, N.Y. TIMES, Sept. 7, 2001. In 2004, a group of state attorneys general negotiated a settlement with Household International Corporation to resolve allegations of predatory lending practices. The Household settlement resulted in consent judgments with 50 States and provided for approximately $484 million in consumer redress and significant reforms to Household's lending practices. GAO Predatory Lending Report at 4, 28, 67. *See also Household to Pay Record Fine and Change Lending Practices*, N.Y. TIMES, Oct. 5, 2008, at C4. In 2006, the attorneys general of 49 States concluded a settlement with Ameriquest Mortgage Company that included $295 million in restitution and injunctive relief against predatory lending practices. *Ameriquest to Pay $325 Million in a Settlement over Lending*, N.Y. TIMES, Jan. 21, 2006, at C13. In 2008, Countrywide Financial Corporation reached an agreement with eleven state attorneys general that included an estimated $8 billion in loan modification and foreclosure relief to

Countrywide borrowers nationwide. Gretchen Morgenson, *Countrywide to Set Aside $8.4 Billion in Loan Aid*, N.Y. TIMES, Oct. 5, 2008, at B1. Although the investigations of these cases initially involved non-bank mortgage lenders, the Associates, Household and Countrywide all were acquired by bank holding companies affiliated with national banks (Citigroup, Inc., HSBC North America Holdings, Inc., and Bank of America, respectively).

Most recently, in a ground-breaking case, the Massachusetts Attorney General sued Fremont Investment and Loan, an out-of-state bank, contending that it made subprime home loans on unfair terms to low-income borrowers who had a limited ability to repay the loans. Finding that the loans were "presumptively unfair," the trial court granted a preliminary injunction, restricting Fremont from foreclosing on the loans. The Massachusetts Supreme Judicial Court upheld the injunction and the findings that the loans were unfair and "doomed to foreclosure." *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548, 554 (Mass. 2008).

By contrast, the OCC's record of enforcing consumer protection laws against national banks has been described as "relatively lax" and "unimpressive," particularly when compared to the more vigorous enforcement efforts of state authorities. Christopher L. Peterson, *Federalism and Predatory Lending:*

Unmasking the Deregulatory Agenda, 78 TEMP. L. REV. 1, 70-74, 77-81 (2005) (hereinafter "Peterson, *Unmasking the Deregulatory Agenda*"). As subprime mortgage lending abuses became epidemic, the OCC and other banking regulators were criticized for their slow response. *See* Edmund L. Andrews, *Fed Shrugged as Subprime Crisis Spread*, N.Y. TIMES, Dec. 18, 2007, at 1; Greg Ip & Damian Paletta, *Lending Oversight: Regulators Scrutinized in Mortgage Meltdown – States, Federal Agencies Clashed on Subprimes as Market Ballooned*, WALL ST. J., Mar. 22, 2007, at A1. Former Federal Reserve Chairman Alan Greenspan has acknowledged that federal regulators lack the skills and resources to effectively police the lending industry for unlawful practices. He also observed that the primary law enforcement role in this area should be with state attorneys general. Jane Wardell, *Greenspan Defends Subprime Market*, ASSOCIATED PRESS, Oct. 3, 2007, available at www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100200784.html.

Elimination of the longstanding state attorney general enforcement function inevitably would result in a diminution of consumer protections in the national banking arena. In a 2006 report, the Government Accountability Office ("GAO") surveyed state officials and found evidence that the OCC's preemption rules had "limited the actions states can take to resolve consumer issues and negatively affected the way

national banks respond to consumer complaints and inquiries from state officials." GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Consumer Protection Laws to National Banks*, p. 17 (2006). The OCC cannot be expected to fill the enforcement void left if it succeeds in forcing state attorneys general from the field. The primary mission and cultural focus of the OCC and other federal banking regulators always has been "monitoring the safety and soundness of their institutions, rather than consumer protection." Peterson, *Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV at 73. The decision below will therefore serve to sweep aside the States' proven effectiveness in combating unfair lending practices by removing fifty state officials from the law enforcement arena.

II. ENFORCEMENT OF NON-PREEMPTED LAWS OF GENERAL APPLICATION BY STATE ATTORNEYS GENERAL DOES NOT CONSTITUTE VISITATION.

A. The OCC's New and Expansive Interpretation of "Visitorial Powers" Is Not Supported by the Plain Language and Past Application of the National Bank Act.

The OCC regulation at issue, 12 C.F.R. § 7.4000, ostensibly is based on the OCC's interpretation of the

visitorial powers provision of the National Bank Act ("NBA"), 12 U.S.C. § 484, enacted in 1864. The NBA provision, in pertinent part, states that "[n]o national bank shall be subject to any visitorial powers except as authorized by Federal law [or] vested in the courts of justice." This provision is contained in a subchapter of the Act entitled "Bank Examinations." 12 U.S.C. §§ 481 *et seq.* The surrounding sections of the subchapter cover other matters specifically related to bank examinations, such as appointment and payment of examiners, special examinations and waivers of examination requirements. 12 U.S.C. §§ 481-83, 485-86.

The placement of the visitorial powers provision in the bank examination subchapter of the NBA (in both the 1864 and current versions of the Act) suggests that "visitorial powers" is a concept closely related to *regulatory examinations* of national banks. Such an interpretation is consistent with the OCC's primary mission of supervising national banks to ensure the safety and soundness of the national banking system. Such an interpretation also is consistent with the OCC's prior visitorial powers regulations. In its 1996 version, § 7.4000 construed visitorial powers solely with reference to conducting bank examinations and reviewing bank records. 12 C.F.R. § 7.4000(b) (1996); Rules and Regulations, OCC Docket No. 96-03, 61 Fed. Reg. 4849, 4869 (Feb. 6, 1996). And, in the 1996 rulemaking, the OCC discussed the amended § 7.4000

in a section entitled "Books and Records of National Banks" and stated that the visitorial powers provision addressed the exclusive examination authority of the OCC. 61 Fed. Reg. at 4858.

In the current version of 12 C.F.R. § 7.4000, the OCC strayed far beyond the realm of bank examinations. In the words of the Second Circuit, the OCC "expansively interpreted" the NBA provision. 510 F.3d at 109. The regulation defines "visitorial powers" to include "[e]nforcing compliance with any applicable federal or state laws" relating to banking activities. 12 C.F.R. § 7.4000(a)(2)(iv). The text expressly prohibits state officials from "inspecting or requiring the production of books or records of national banks, or prosecuting enforcement actions." *Id.* § 7.4000(a)(1). Through this expansive interpretation of visitorial powers, the OCC is taking the extreme step of barring state attorneys general from exercising any investigative or enforcement role with respect to any and all banking-related activities of national banks.

In addition, the OCC narrowly interpreted the NBA's reference to "courts of justice" and asserted that legal enforcement actions brought in the courts by state officials constitute prohibited visitation that is not covered by the courts of justice exception. This new interpretation rejects a history of over 100 years of state enforcement actions. At the District Court

stage of this case, the OCC acknowledged that its new, restrictive interpretation of the "[c]ourts of [j]ustice" exception was inconsistent with its prior interpretation of the term. *OCC v. Spitzer*, 396 F. Supp. 2d 383, 404 (S.D.N.Y. 2005). The extremism of the OCC's position is revealed in the one form of legal action it authorized state attorneys general to bring: "Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the Federally-authorized business of a national bank or is preempted." Bank Activities and Operations, 69 Fed. Reg. 1895, 1900 (Jan. 13, 2004). A state attorney general is unlikely to seek a preemption declaration as to the applicability of a state law when the OCC would bar it from enforcing the state law, preempted or not.

Judicial decisions also have linked the exercise of visitorial powers to bank examination and superintendence, as opposed to enforcement of public laws. In one of the first cases construing the visitorial powers provision of the NBA, the Sixth Circuit declared that a county tax assessor could compel a national bank to produce deposit records, finding that such an investigation did not constitute visitation. *First Nat'l Bank of Youngstown v. Hughes*, 6 F. 737, 740-41 (6th Cir. 1881). The court cited with favor a definition construing visitation as "inspection; superintendence; direction; regulation." *Id.* In *Guthrie v. Harkness*, 199 U.S. 148, 158 (1905), this

Court relied on *Bank of Youngstown*, stating that visitation is the "act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations." The term therefore refers to the exercise of supervisory authority to examine corporate records and to review compliance with the corporate charter and bylaws. The *Guthrie* Court also stated that the NBA's visitorial powers provision "did not . . . take away the right to proceed in courts of justice to enforce such recognized rights as are here involved." 199 U.S. at 159.

In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), which upheld the right of a state attorney general to enforce state law against a national bank, also involved the distinction between visitation and the general enforcement of state laws. In *St. Louis*, the Court found that Missouri was seeking to enforce a state law and was not exercising visitorial powers relating to the bank's compliance with its charter:

> The State is neither seeking to enforce a law of the United States nor endeavoring to call the bank to account for an act in excess of its charter powers. What the State is seeking to do is to vindicate and enforce its own law, and the ultimate inquiry which it propounds is whether the bank is violating

> that law, not whether it is complying with the charter or law of its creation.

263 U.S. at 660.

There is nothing in the plain language of the NBA to support the OCC's view that the Act's visitorial powers provision limits actions by state officials to enforce non-preempted state laws. The provision's specific reference to "powers . . . vested in the courts of justice" further undermines the OCC's attempt to exclude attorneys general from seeking relief in the courts for violations of non-preempted state laws. The OCC simply has stretched the definition of visitorial powers well beyond its traditional meaning in an effort to achieve the OCC's objective of preempting state enforcement against national banks.

B. State Attorneys General Do Not Exercise Visitorial Powers.

As noted above, the term "visitorial powers" refers primarily to audit and examination functions of supervisory officials. The undersigned attorneys general are not seeking to exercise such visitorial powers or to claim the right to supervise federally chartered banks.

State attorneys general are law enforcement officers who have the general duty and authority to investigate and prosecute violations of non-preempted state laws. As such, the role of attorneys general is very different from that of state banking commissioners. State banking commissioners, like their federal counterparts, license, supervise, and examine financial institutions within their regulatory jurisdictions. Unlike a banking supervisor, an attorney general does not have the authority to oversee banking operations on a routine or systematic basis. The dissent below recognized the distinction between the two roles: "The state Attorney General has not expressed an interest in analyzing national banks' activities under their national banking charter, but instead is exercising his authority under the state's police power to investigate civil rights violations being committed by New York entities in New York." 510 F.3d at 128 (Cardamone, J., dissenting).

This case therefore is distinguishable from this Court's recent decision in *Watters*, on which the court below relied. While conceding that *Watters* did not directly address the ultimate issue before it in this case, the Second Circuit majority read *Watters* to imply that investigation and enforcement by state officials could constitute visitorial authority. *Clearing House*, 510 F.3d at 116 (citing *Watters*, 550 U.S. at 14-15). But the Second Circuit's reliance on *Watters* was misplaced. *Watters* dealt with the OCC and a

preemption issue, but it did not construe the regulation at issue here and did not resolve whether *Chevron* deference should be accorded to any OCC preemption rule. In *Watters*, the question was whether operating subsidiaries of national banks have the same status as the banks themselves for purposes of a preemption analysis directly under the NBA. There was no dispute in *Watters* that Michigan's licensing and inspection requirements would constitute the exercise of visitorial powers if applied directly to national banks. *Watters*, 550 U.S. at 15.

By contrast, the preemption issue here does not concern the traditional regulatory activities of licensing, supervision and examination, but instead concerns whether a State is permitted to enforce a non-preempted state law governing discrimination in the pricing of credit. The former activities are properly deemed to be visitorial; the latter is not.

Further, there is a pertinent distinction between administrative and judicial enforcement. This distinction is recognized in the "courts of justice" exception to the limitation on visitorial powers in the NBA, 12 U.S.C. § 484. As a general rule, enforcement actions by attorneys general are conducted through the courts, not by direct administrative order as part of a regulatory regime. Actions in the "courts of justice" also provide national banks with the added insulation

of an impartial judge as protection against any improper state enforcement demands.

C. State Attorneys General Have an Established History of Non-Visitorial Enforcement of State Consumer Protection Laws Against National Banks.

State attorneys general have enforced their states laws against national banks for many years. This history of enforcement belies the OCC's contention that such enforcement constitutes the exercise of prohibited visitorial powers. The NBA's provision on visitorial powers has remained in place since 1864 and, until now, it has not been used as a device to block enforcement by attorneys general of applicable state laws. As the dissenting opinion below noted: "[V]irtually from the inception of the National Bank Act the term [visitorial powers] was not understood to preclude state enforcement of nonpreempted state laws." 510 F.3d at 129 (Cardamone, J., dissenting).

There are numerous reported cases reflecting legal actions taken by state attorneys general against national banks.[5] There have been far more consumer

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[5] *See, e.g., Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962, 966 (D. Minn. 2001); *New York v. Citibank,*

protection cases or investigations that have resulted in settlement agreements or assurances of voluntary compliance.[6] These cases and investigations generally have been resolved without assertions by banks that the actions were visitorial or subject to the exclusive enforcement jurisdiction of the OCC. Many attorney general offices also receive and mediate consumer complaints submitted by citizens against a wide variety of businesses, including national banks. Occasionally, resolution of consumer complaints requires further investigation or more formal action, and attorneys general traditionally have proceeded without the bank or the OCC objecting to any purported intrusion on the OCC's visitorial powers.

N.A., 537 F. Supp. 1192 (S.D.N.Y. 1982); *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406 (Alaska 1982); *State v. Sgrillo*, 859 P.2d 771 (Ariz. 1993); *Attorney General v. Michigan Nat'l Bank*, 312 N.W.2d 405 (Mich. Ct. App. 1981), *rev'd on other grounds*, 325 N.W.2d 777 (Mich. 1982); *State v. Scott Runyan Pontiac-Buick, Inc.*, 461 S.E.2d 516 (W. Va. 1995); *State v. Ameritech Corp.*, 517 N.W.2d 705 (Wis. Ct. App. 1994).

[6] For example, in 2002-2003, a group of state attorneys general negotiated agreements with a series of national banks resolving issues about the banks' selling customer information to third-party telemarketers. *See* GAO, *OCC Preemption Rules: OCC Should Further Clarify the Applicability of State Laws to National Banks*, p. 20 (2006) (hereinafter "GAO Report on OCC Preemption Rules").

In some cases, in order to obtain relief for victims of fraudulent practices, attorneys general act against banking institutions not because the banks perpetrated fraud, but because they have financed suspect transactions by a retail merchant such as a home improvement contractor or car dealer. As the West Virginia Supreme Court noted in allowing that State's attorney general to maintain an action against a national bank that financed the allegedly unlawful sale of motor vehicle extended warranties:

> Logic and experience dictate that if the types of lawsuits which the Attorney General could bring under the CCPA [the state consumer protection act] did not include lawsuits against financial institutions such as the defendants, these institutions could, if unsavory, run in effect a "laundry" for "fly-by-night" retailers that seek to excessively charge their customers. Consequently, the real meaning of consumer protection would be stripped of its efficacy.

State v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 526 (W. Va. 1995).

In other cases, attorneys general may enforce state consumer protection laws against third parties who conduct deceptive sales solicitations in affiliation

with banks. For example, in *State of Minnesota v. Fleet Mortgage Corp.*, 158 F. Supp. 2d 962 (D. Minn. 2001), the Minnesota Attorney General brought suit in federal court against Fleet Mortgage Corporation (a national bank subsidiary) for deceptive telemarketing practices. The Attorney General alleged that Fleet was providing customer information and billing services to telemarketing companies who were selling memberships for purported discount buying plans. Although the telemarketing sales had nothing to do with banking services, Fleet, supported by the OCC as *amicus*, argued that only the OCC could enforce state consumer protection laws against it. The District Court rejected Fleet's motion to dismiss, holding that "[f]ederal law does not require that the OCC have exclusive enforcement over such actions." *Id.* at 966.

By a strained and novel interpretation of the visitorial powers provision of the NBA, the OCC seeks to deny this longstanding enforcement role of the attorneys general. The OCC's regulation, supported by the decision below, not only rejects years of past enforcement practice, it will have a substantial negative impact on the consumers that state attorneys general have been fighting to protect.

III. THE OCC'S INTERPRETATION OF THE NATIONAL BANK ACT'S VISITORIAL POWERS PROVISION IS UNREASONABLE AND IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

A. National Banks Are Not Immune from the Application and Enforcement of State Laws.

It is well established that the historic police powers of the States are not to be preempted without a showing that this "was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). However, the Second Circuit found that the presumption against preemption does not apply in this case because the field of national bank regulation has been "substantially occupied by federal authority for an extended period of time." *Clearing House*, 510 F.3d at 113 (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 314 (2005), *cert. denied*, 550 U.S. 913 (2007)). The Second Circuit majority's disregard of the presumption against preemption was error and led to further error in that court's federalism analysis, as well as in its application of the *Chevron* doctrine.

Enforcement of non-preempted state consumer protection laws, in the financial services arena and otherwise, is not a field that traditionally has been

occupied by the Federal Government. Consumer protection enforcement has long been a significant area for the exercise of state police powers. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (refusing to intrude upon the States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers" without evidence of clear intent of Congress). While the OCC is the primary regulator of national banks, it has not occupied the field of consumer protection or fair lending enforcement.

In fact, the States' power to enforce their non-preempted laws through court actions against national banks has been recognized by this Court since the enactment of the NBA. As Judge Cardamone pointed out in his dissent, "[c]onsiderable authority supports the proposition that states have the authority to enforce such laws against national banks." 510 F.3d at 129 (Cardamone, J., dissenting). In 1869, the Court observed that national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *Nat'l Bank v. Kentucky*, 76 U.S. (9 Wall.) 353, 362 (1869). In *First National Bank of Bay City v. Fellows*, 244 U.S. 416 (1917), this Court held that the Michigan Attorney General could sue a national bank in state court to enforce state antitrust laws. In *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (1924), the Court held that the Missouri Attorney

General could prosecute an action against a national bank to enforce a state law prohibiting branch banking. *Id.* at 659-60. The Court pointed out the absurdity of denying the State the right to enforce applicable state laws:

> [S]ince the sanction behind [the state statute] is that of the State and not that of the National Government, the power of enforcement must rest with the former and not with the latter. To demonstrate the binding quality of a statute, but deny the power of enforcement involves a fallacy made apparent by the mere statement of the proposition, for such power is essentially inherent in the very conception of law.

Id. at 660.

In this case, the New York Attorney General is attempting to enforce a non-preempted state law against a national bank, as was the Missouri Attorney General in *St. Louis*. The OCC should not be able to interfere with New York's sovereign enforcement powers, particularly when enforcement of state fair lending laws is not an area in which the OCC has even ventured, let alone occupied. The authority of the State of New York to enforce its laws of general application against national banks should be

recognized and upheld, free from federal interference, as an inherent feature of our federalist system of government.

B. Because of the Sensitive Issues of Federalism Present in this Case, the NBA's Visitorial Powers Provision Should be Interpreted Independently by the Courts, Not by *Chevron* Deference to the OCC's Legal Analysis.

The case at bar is not the ordinary *Chevron* deference case, where neutral agency expertise is allowed to fill the gaps in a complex regulatory statute. Under *Chevron*, if there is ambiguity as to congressional intent in a statute, courts give weight to a reasonable construction of the statute by the administrative agency, as a part of the agency's "gap-filling" role. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844-45 (1984). This deference is particularly appropriate when, as in *Chevron* (which dealt with air pollution standards), the subject matter is "lengthy, detailed, technical, [and] complex." *Id.* at 848, 865; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (expert agency opinion identifying conflicting state laws may be entitled to "some weight," particularly when "the subject matter is technical").

By contrast, the OCC's interpretation of the NBA provision at issue here does not merely fill some gap in the NBA; it instead makes a major legal and policy determination that intrudes on the role of the States in our federal system. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion").

It is well established that without a clear statement of congressional intent, federal agencies should not preempt States from exercising their sovereign functions. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."). This Court has expressly declined to grant *Chevron* deference when doing so could implicate serious constitutional and federalism issues. In *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court articulated an "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. The Court went on to note that its concern "is heightened where the administrative interpretation alters the federal-state framework by permitting

federal encroachment upon a traditional state power." *Id.* at 173.

The Second Circuit acknowledged that there is no unambiguous expression of congressional intent to displace state enforcement in § 484 of the NBA. *Clearing House*, 510 F.3d at 117. The court also observed that the OCC's rulemaking lacked "any real intellectual rigor or depth" and found that there was "very little about the OCC's rather cursory analysis that, in a different context, could justify this Court's deference under *Chevron*." *Id.* at 119. Nevertheless, despite these misgivings, the panel majority considered itself bound to uphold the OCC's expansive interpretation of visitorial powers under the *Chevron* framework. Judge Cardamone was correct, however, when he stated that *Chevron* did not apply to the preemption determination at issue: "[I]t is well established that an agency's construction of a statute that upsets the usual constitutional balance between federal and state powers is never entitled to deferential review under *Chevron*." *Id.* at 131 (Cardamone, J., dissenting). The OCC's attempt to bar States from enforcing their nonpreempted fair housing and consumer protection laws unquestionably upsets the usual constitutional balance between the federal and state governments.

In accord with Judge Cardamone's position, a substantial body of recent scholarly commentary has

argued that deference to an agency's legal analysis is inappropriate when sensitive issues of federalism are involved. *See, e.g.*, Nina A. Mendelson, *Ordering State-Federal Relations Through Federal Preemption Doctrine: A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 698 (2008); Recent Cases, *Federal Preemption – Chevron Deference – Second Circuit Finds National Bank Operating Subsidiary Exempted From State Law – Wachovia Bank v. Burke*, 119 HARV. L. REV. 1598, 1601 (2006) (observing that recent scholarly literature "has called into question whether *Chevron's* rationales retain much persuasive force in preemption contexts" and noting that "when preemption issues arise, agencies lose much of their expertise advantage relative to courts"); Damien Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 279 (1998) (noting that "it is highly problematic to assert that agencies have expertise in determining the proper balance between federal and state power").

Most recently, in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007), this Court found it unnecessary to decide whether another OCC preemption regulation was entitled to *Chevron* deference and instead based its resolution of the case on the language of the statute. However, the dissenting justices in *Watters* noted that "when an agency purports to decide the scope of federal preemption, a healthy respect for state sovereignty calls

for something less than *Chevron* deference." 550 U.S. at 41 (dissenting opinion of Stevens, J., joined by Roberts, C.J. and Scalia, J). The issue of state sovereignty is more pronounced here than in *Watters*. The OCC is seeking to usurp the States' power to enforce their own non-preempted laws and to claim for itself the sole authority to enforce such laws. In the States' view, no deference is owed to a federal agency making such a radical attempt to interfere with the inherent powers of the States.

C. The OCC Is Not Entitled to *Chevron* Deference in This Case Because of Its Self-Interest in Preempting State Law.

The OCC regulation at issue here is just one facet of an ongoing campaign by the OCC to use its regulatory and rulemaking authority to substantively preempt state consumer protection laws as well as state enforcement of those laws.[7] The OCC's self-

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[7] Over ten years ago, Congress expressed concerns about the OCC's preemption initiatives. In enacting the Riegle-Neal Banking and Branching Efficiency Act of 1994, the conferees on the bill noted: "During the course of consideration of this title, the Conferees have been made aware of certain circumstances in which the Federal banking agencies have applied traditional preemption principles in a manner the Conferees believe is inappropriately aggressive resulting in preemption of State law in situations where the federal interest did not warrant

interest in protecting its constituent banks, not disinterested statutory analysis, apparently is driving the OCC's position on visitorial powers.

For example, when States were enacting predatory lending laws to curtail the worst abuses of subprime mortgage lending, the OCC fought to protect its constituent national banks from having to comply with those laws. In 2003, in response to a request from national bank-related subprime lenders, the OCC issued a Preemption Determination and Order, preempting Georgia's Fair Lending Law, Ga. Code Ann. §§ 7-6A-1, *et seq.* *See* OCC Docket No. 03-17, 68 Fed. Reg. 46,264 (Aug. 5, 2003). The Preemption Determination was generally critical of state predatory lending laws and found that in all aspects, the Georgia law (and, by implication, all similar state laws) impermissibly interfered with the lending authority of national banks and their subsidiaries. The OCC went beyond traditional national banking preemption areas, such as restrictions on interest rates and loan fees, and preempted even widely accepted and minimally burdensome consumer protections on high cost home loans. The OCC specifically found that the following provisions aimed at policing high cost loans impermissibly obstructed or impaired the lending ability of national banks: restrictions on negative

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that result." *See* H.R. Rep. No. 103-651, at 53 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2068, 2074.

amortization and balloon payments; limitations on acceleration without default; restrictions on loan "flipping"; requiring borrower counseling before a high-cost loan could be consummated; and a prohibition on the practice of encouraging borrowers to default on their existing loans. OCC Docket No. 03-17, 68 Fed. Reg. 46,264, 46,276-78 (Aug. 5, 2003).

In 2003, the OCC proposed sweeping regulations that preempted virtually all state consumer protection laws relating to national bank loans, under the theory that such consumer protections "obstruct, impair or condition" banks' ability to engage in federally authorized lending activities. Bank Activities and Operations; Real Estate Lending and Appraisals, OCC Docket No. 03-16, 48 Fed. Reg. 46,119 (Aug. 5, 2003). All fifty state attorneys general submitted comments in opposition to the OCC's proposed preemption rules.

The attorneys general noted that the OCC "has zealously pushed its preemption agenda into areas where the states have engaged in enforcement and regulatory activity without controversy for years." Comments of Attorneys General of 50 States (Oct. 6, 2003), p. 1, OCC Docket No. 03-16, reprinted in *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 108-09 (2004) at 102-19. The attorneys general also pointed out that even as the OCC was taking a

wrecking ball to state predatory lending laws, it had proposed only minimal restrictions on the subprime lending activities of national banks and their mortgage lending subsidiaries. *See generally* Robert Berner & Brian Grow, *They Warned Us: The Watchdogs Who Saw the Subprime Disaster Coming – and How They Were Thwarted by the Banks and Washington*, BUS. WK., Oct. 9, 2008, at 36 (OCC brushed aside concerns of state attorneys general about reckless and abusive mortgage lending practices); Jess Bravin & Paul Beckett, *Friendly Watchdog: Federal Regulator Often Helps Banks Fighting Consumers – Dependent on Lenders' Fees, the OCC Takes Banks' Side Against Local, State Laws*, WALL ST. J., Jan. 28, 2002, at A1 (OCC frequently has intervened on behalf of national banks and their subsidiaries when consumer rights are at stake). Nevertheless, the preemption regulations were adopted in early 2004 and codified as 12 C.F.R. §§ 34.4 and 7.4008 (d).

The OCC issued its visitorial powers rule preempting state enforcement in January 2004, at the same time it announced its rule substantively preempting state consumer protection laws. Forty-five state attorneys general filed comments in opposition during the rulemaking process, contending that 12 C.F.R. § 7.4000, as proposed, "exceeds the scope of Congressional authority, misinterprets the National Bank Act, and reflects a change in the OCC's historic position." Comments of Attorneys General of 45 States

(Apr. 8, 2003), p. 1, OCC Docket No. 03-02, reprinted in *Congressional Review of OCC Preemption: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 108th Cong. 108-09 (2004) at 120-35.

The OCC's preemption initiatives "are widely viewed by commentators as serving the interests of big, multistate national banks." *See* Arthur A. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority*, 23 ANN. REV. BANKING & FIN. L. 225, 276 (2004). The OCC has a "strong incentive" to persuade major banks to retain or convert to national charters because the OCC's budget is almost entirely funded by fees paid by national banks. *Id.* By promoting a regime of *de facto* field preemption for national banks, the OCC is "clearly encouraging large multistate banks to select national charters for the purpose of avoiding the application of state laws, except for those helpful state laws that 'support[] the ability of national banks . . . to do business.'" *Id.* at 276-77. Former Comptroller of the Currency John D. Hawke, Jr., has acknowledged that the OCC's power to override state consumer protection laws is an incentive for banks to seek chartering under the OCC. Bravin & Beckett, WALL ST. J., January 28, 2002, at A1.

The OCC's unabashed self-interest in preempting state law in order to attract large national banks to its constituency should be a significant factor in weighing

the degree of deference owed to the OCC under *Chevron*. Such self-interested rulemaking is not the kind of impartial and disinterested agency consideration contemplated under *Chevron*. *See* Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 265 (2004) (observing that the *Chevron* approach "presupposes that the agency's interpretation represents an impartial and disinterested exercise of its interpretative authority"); Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1009 (1999) (maintaining that agency interpretations of statutes that implicate "agency self-interest" – either by advancing the agency's financial interests or by expanding the scope of its regulatory powers – should not receive *Chevron* deference and should be reviewed *de novo* by the courts); Cass R. Sunstein, *Law and Administration after Chevron*, 90 COLUM. L. REV. 2071, 2101 (1990) (contending that it would be "peculiar" to defer to agency views where there is a likelihood of agency bias and self-dealing).

Judicial deference to the OCC's interpretation of the NBA's visitorial powers provision is particularly inappropriate where agency bias is apparent on multiple grounds. The OCC has exhibited an aggressive policy favoring preemption of state consumer protection laws; it has a financial self-interest in protecting the national banks that pay the

OCC's operating costs; and it has an interest in expanding its own claim of unitary authority by displacing state enforcement. For these reasons alone, *Chevron* deference should not be applied to the OCC regulation at issue in this case.

CONCLUSION

The decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,
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